

Department of Social Research  
University of Helsinki  
Finland

## **RELATIONAL SUBJECTS**

**FAMILY RELATIONS, LAW AND GENDER IN THE  
EUROPEAN COURT OF HUMAN RIGHTS**

**Linda Hart**

ACADEMIC DISSERTATION

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# ABSTRACT

This study is a sociological analysis of the establishment and recognition of family relations in the case law of the European Court of Human Rights. How are close personal relations between adult couples and children and their parents recognised in the case law of the European Convention on Human Rights? What kinds of combinations of biological, legal, social and gendered personal relations are regarded as family life in legal disputes between individual applicants and Member States of the Council of Europe? The analysis develops a notion of “relational subjects” (Lacey 1996: 150) framed by perspectives from feminist legal theory, relational sociology and contemporary debates on the law and politics of family formation, and offers a sociological reading of relevant ECHR case law. Relevant judgements from 1979–2014 act as primary data, supported by relevant inadmissibility decisions and reports from 1960 onwards (90 cases).

In the data, a historical shift from emphasising status (married/unmarried, male/female) in the earlier judgements and decisions towards identity (sexual orientation, gender identity, genetic origins, genealogy) in recent case law may be identified. The notion of individual rights holders is examined from a relational perspective inspired by sociological and anthropological theory and gender studies in law, emphasising the importance of life-sustaining relations of care and dependency in the spirit of feminist relational (legal and political) theory that do not always follow preconceived structures of kinship recognition. Furthermore, it is enquired whether relations between legal subjects are more fruitfully viewed as ‘transactional’ or ‘transcendental’ from the point of view of two differing academic schools in the field of relational sociology, one among many other general theories on the constitution of society.

It is argued that a process of divergence between *alliance* (marriage, civil unions, cohabitation) and *filiation* (legally recognised parent-child relations) has been intensified with the emergence of same-sex marriage and civil unions in the European legal arena in recent years. Politically and legally, alliance is simpler to transform into a ‘gender-neutral’ legal relation than filiation. Both gender and physical sex, as social and biológico-legal dimensions of the dichotomy of masculine/feminine, provide critical perspectives into the establishment of relations of filiation. It is argued that from a human rights perspective a gender-sensitive approach is required in relation to questions of corporeal maternity and paternity, as complex issues such as access to knowledge of one’s genetic origins and the inalienability of the human body in processes of assisted reproduction crop up in many contexts of which ECHR case law is just one arena.

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# ABBREVIATIONS

|                |  |
|----------------|--|
| CEDAW          | Convention on the Elimination of All Forms of Discrimination Against Women |
| CRC            | Convention on the Rights of the Child                                      |
| ECHR           | European Convention on Human Rights and Fundamental Freedoms               |
| e.g.           | <i>exempli gratia</i> , “for example”                                      |
| EU             | European Union   |
| European Court | European Court of Human Rights (Strasbourg, France)                        |
| ICESCR         | International Convention on Economic, Social and Cultural Rights           |
| ICCPR          | International Convention on Civil and Political Rights                     |
| i.e.           | <i>id est</i> , “that is”  |
| LGBT           | lesbian, gay, bisexual and transgender persons                             |
| OSCE           | Organisation for Security and Cooperation in Europe                        |
| UDHR           | Universal Declaration of Human Right                                       |







# INTRODUCTION: FAMILIES IN A EUROPEAN CULTURE OF HUMAN RIGHTS

*We cannot yet imagine what law would look like in a genuinely equal world peopled by relational subjects connected to each other by mutual respect for each other's irreducible difference.<sup>1</sup>*

Nicola Lacey (1996: 150)

What happens when a couple get married or form a civil union and they either answer “I do” or sign the piece of paper given to them by the bureaucrat in front of them? What takes place in a delivery room when the details of a baby born just a few minutes ago are typed by a midwife on a computer and added to a population database? What happens in a child support officer’s office or at a fertility clinic when a man signs documents recognising his paternity or consent for taking part in assisted reproduction? These are all moments, be they part of a messy event of nature as in a delivery room or formal as in a bureaucrat’s office, where and when significant legal relations between people are created in different contexts: moments when spouses, companions, mothers, fathers, daughters and sons and relations of affection, loyalty, obligation, dependency, care, social status and wealth come into being. Obviously, the form of the acts and techniques of creating legally significant relations vary from one jurisdiction to another, as legislation and procedures differ from one State to another. Possibilities of being party to these moments are not open to everyone, as the creation of each type of relation is subject to structures and rules which involve one’s legal sex, age, marital status and pre-existing blood or other relations and circumstances regarding the other individuals involved.

What is it that binds individuals together as couples, parents, children and family members in the eyes of law? What are family members to each other, if looked at from the perspective of human rights thinking, which is essentially about the relation between an individual or a pair or group of individuals and their State in question? This study is an endeavour to analyse social and historical change in applications made to the protection of family life in the European Court of Human Rights during the first six decades of the existence of the European Convention on Human Rights and Fundamental Freedoms from the 1950s to the early 2010s. This historical era has borne witness to fascinating change in the way persons, or legal subjects governed by family law, have been perceived in European human rights jurisprudence, from the time unmarried mothers had to adopt their own children born out of wedlock

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<sup>1</sup> Emphasis added.

in order to be their legal parents<sup>2</sup> to the time same-sex couples argue for the right to marry or to form recognised unions<sup>3</sup>. These two examples of major shifts in perceiving the right to formally recognised close personal relations – one effectively argued and achieved decades ago and the other one being fiercely debated but also widely legislated upon at the moment – display the importance of status (legal sex; marital status) and identity (gender identity; sexual orientation) in the realm of the recognition of family relations.

## **I RELATIONAL APPROACH TO LEGAL SUBJECTS**

Who are the main characters of this study, “relational subjects” (Lacey 1996: 150)? Theories concerning the relationship between feminist relational theory in the field of legal theory and law in general or family law in particular has been subject to considerable debate, producing a field of scholarship of its own (see Leckey 2008; Nedelsky 2011; Mackenzie and Stoljar 2000; Minow and Shanley 1996). In this study, the notion of relational subjectivity is taken as an insight that aims to tackle the paradox between the protection of family life, a bundle of criss-crossing human relations of affection, authority, dependency, possession and care, from the perspective of an individual rights holder (Held 1998: 508), the subject of international human rights law. Applying this notion is also an attempt to understand how the boundaries of who is entitled to legally protected family relations in the European context are being redrawn in the early 21st century, with special attention to the importance given to and the resistance against doing this with regard to gender and sexuality. The possibility to form civil unions, marry and whether and how to institute parental rights to social parents in families formed by same-sex couples has been and still is one of the most topical themes in the area of family law and adjacent legal fields in the early twenty-first century (see e.g. Wintemute and Andenaes 2001; McClain and Cere 2013).

On the level of public debate, this is a civil and human rights issue to be framed and decided by citizens, civil society movements, politicians and legislators on a national level. The notion of “relational subjects”<sup>4</sup> has been taken from Nicola Lacey, a British feminist legal scholar, who mentioned this notion somewhat in passing in an article inspired by the thought of Luce Irigaray, a French philosopher who has written, for example, on the ethics of

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<sup>2</sup> *Marckx v. Belgium*, no. 6833/74, 13 June 1979, Series A no. 31.

<sup>3</sup> See *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010 and *Vallianatos and others v. Greece* [GC], no. 29381/09 and 32684/09, 7 November 2013. For more recent developments outside the scope of the analysis of this study, see *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015. Some applications (e.g. *Chapin and Charpentier v. France* (no. 40183/07), *Orlandi and Others v. Italy* (no. 26431/12) are pending on the matter of same-sex marriage in the European Court (European Court of Human Rights 2015a).

<sup>4</sup> See opening quote to this Introduction.

gender difference and ideals of justice (cited in Lacey 1996; for more detail see Lacey 1995). Obviously, all subjects are “relational”, as human beings and persons, even though individual in a number of bureaucratic categorisations, cannot exist without life-sustaining relations to their kin, co-citizens and States. However, as noted above, the recognition of human relations deemed important and life-sustaining by individuals themselves from a subjective viewpoint is not self-evident, and has been restricted and curtailed by States due to a great deal of considerations, be it the interest of other persons, corporations or public policy (see Johnson 2013; Dembour 2006; McGlynn 2006).

If the idea of relational subjects and “respect for each other’s irreducible difference” (Lacey 1996: 150) are taken seriously in the context of human rights and family law, the dimensions of gender and sexuality are of central importance in debates on equality and non-discrimination today. However, just a few decades ago debates on same-sex marriage or same-sex couples raising children as legally recognised parents would have seemed utopian and far-fetched as homosexuality constituted a crime in most European jurisdictions (see Grigolo 2003; Cretney 2006; Johnson 2013). The notion of relational subjects is an attempt to name and analytically dissect the ideal that activists and advocates arguing, for example, for same-sex marriage in Europe today are after as they lay claims for equality in an area of legal and political debate which would have been seen as unfounded in earlier times (Meyer 2013; Hodson 2011, 2012, 2014). On a more theoretical level, it means rewriting certain principles of family law or similar areas of civil law according to new principles of gender-neutrality and conceptualising intimate relationships between adults and parental relations between adults and children in a way that shakes the foundation of kinship as an institution that articulates the difference of sexes and generations (see Théry 1996, 1997, 1998, 1999)<sup>5</sup>. On this level, the ‘promise of equality’ (see Hart 2009: 557) that advocates of LGBT (lesbian, gay, bisexual, transgender) family rights are after is a way of testing some of the deepest divisions in our societies, those based on a person’s biological sex in relation to other persons.

The purpose of this study is to analyse the history of the formation and recognition of family relations in relevant case law of the European Court of Human Rights and see how relational subjectivity surfaces in relation to personal identity, gender and sexuality in this data. Examples of this may be taken from Belgium the 1970s and the abolishment of discrimination against children born to unmarried mothers<sup>6</sup> or Austria in the 2000s and the possibility of same-sex marriage, access to assisted reproduction and the

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<sup>5</sup> The articulation of the difference between sexes and generations makes one think of a grid of sexes and generations that could be similar to Judith Butler’s notion of the “heterosexual matrix” (1990), but rests on the thinking put forward by Irène Théry on kinship as the institution that articulates the difference between sexes and generations (1998).

<sup>6</sup> See *Marckx v. Belgium*.

possibility of step-parent adoption for same-sex couples<sup>7</sup>. The notion of relational subjects is also partly inspired by a notion that has been called a “self-founded subject” (*sujet autofondé*) in French academic literature, discussed by Irène Théry (2007: 582-4), a legal sociologist specialised in issues of family law. Théry is critical of this notion, but acknowledges it to be found in the work of Pierre Legendre, a French legal and psychoanalytical theorist, who has been influential in framing the more value-conservative tones regarding individualisation and social change in family formation in the French context (Legendre 1985; Spire 2001)<sup>8</sup>. According to Théry, the Legendrian view of the undesirability of over-empowered and self-constituting subjects has been developing side by side with technoscientific change in Western industrialised societies (Théry 2007: 583; see Legendre 1999). A self-founded subject, it seems, defines herself or himself without responsibility towards social structures held up by earlier generations, restricting social institutions or even psychological categories and it is this that is seen as destructive to social relations by Legendre and the like-minded. Alain Supiot, a French legal scholar, has also deplored the apparent triumph of autonomously founded subjects in recent years, as demonstrated by, for example, same-sex marriage, different forms of civil partnerships for same-sex couples and various forms of instituting parenthood for couples involving non-heterosexual or transgender persons (2008: 201-202).

The opposing camps in debates in recent years over what family is and should be have been characterised with a variety of concepts. In a collection of essays trying to establish dialogue between value-conservative and value-liberal viewpoints in the context of the United States, *What is Parenthood?* (McClain and Cere 2013), the notions of “integrative” and “diversity” models of family have been adopted. In this schema, the word “integrative” points to the primacy of a heterosexual, marriage-based family form backed up with knowledge from the fields of natural science, theology and natural law and how this form of family life should be indicated as the one to aspire to in law and policy (Cere 2009, 2013; Browning 2013). In turn, the “diversity” model stresses an emic<sup>9</sup> point of view to family life, and knowledge from social sciences and critical perspective such as feminist and minority studies

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<sup>7</sup> *Schalk and Kopf v. Austria, S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011 and *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013.

<sup>8</sup> Legendre's position has come clear also in some opinion pieces and interviews during debates on *Pacs* and same-sex marriage in France. See, for example, interview in the newspaper *Le Monde* 22 October 2001, where he argues that granting homosexuals “familial status” is equivalent to applying democratic principles in order to implement a fantasy: “Et les Etats contemporains se lavent les mains quant au noyau dur de la raison qui est la différence des sexes, l'enjeu œdipien... L'Occident a su conquérir la non-ségrégation, et la liberté a été chèrement conquise, mais de là à instituer l'homosexualité avec un statut familial, c'est mettre le principe démocratique au service du fantasme” (interview in Spire 2001).

<sup>9</sup> ‘Emic’ refers here to relations defined and named by the subjects in question.

(McClain 2013; Stacey 2013). In the abovementioned volume, many of the authors pick up this pair of notions and provide their own alternatives. Stacey (2013: 65) replaces these with “singular (universalist)” and “pluralist”, as the first one stresses the functional and moral superiority of a certain family structure (monogamous marriage of a man and a woman and their biological children), while the latter rejects hierarchies of family forms and stresses the quality of parenting and family life, valuing a diversity of individual identities. As Stacey notes, “We are engaged, in essence, in ye olde structure versus process debate about family quality” (2013: 65). In this study, ‘singularist’ and ‘pluralist’ are used throughout to refer to the two opposing views that seldom have been brought to actual dialogue as in *What is Parenthood?* (McClain and Cere 2013).

From an external, singularist point of view that proponents of heterosexual marriage champion as the supreme form of family life, the parameters of family life adhere to a pre-existing order within which individuals fulfil roles that are open to them on the basis of their age, gender, marital status and existing kinship ties. This perspective may be founded on religious doctrine (see Browning 2013), a notion of acknowledging one’s place in relation to the gendered Other (Théry 1996, 1997, 1998), a Republicanist notion of the citizen as a gendered being, acting in unison with institution of the universalist Republic (Robcis 2013), or natural law as a source for a universalist politico-moral order, as expressed in more conservative readings of the Universal Declaration of Human Rights and international human rights law (Glendon 2009; Matlary 2009; Adolphe 2006). In sum, according to these views described above, family life is a privileged sphere of human existence that may be entered by marrying a person of the opposite sex who is not included in categories of prohibited degrees of relationships and the appropriate space for sexual relations and giving birth to children is within (religiously sanctioned) marriage. This, in turn, is supposed to reproduce society and maintain the familiar and habitual order of gendered relations that public policy and an ordered social life are seen to rest on.

The main characteristics of the singularist order are status – in the form of marriage, making sexuality and procreation licit and designating a father (see Leckey 2008: 248) – and a dichotomous gender order: kinship makes sense only in the form of a collateral system where relations flow from a double reference to male and female, the insurmountable limits of classification and thinking (see Héritier 1996: 19-22). This singularist perspective is met by an opposing perspective that may be called ‘pluralist’ in the sense of breaking with pre-existing moral authorities such as religion and forms of expert knowledge that are seen as conservative. The recognition of the importance of individual autonomy and identity has been gradually more recognised by the European

Court of Human Rights as well (see *Christine Goodwin v. United Kingdom*<sup>10</sup>). In the realm of family relations, this can be seen in the areas of intimate relations between adults and relations created by means of legal fictions primarily concerning adoption, but in some contexts also assisted reproduction.

From this pluralist point of view, individuals are indeed self-constituting and self-defining subjects when it comes to conceiving the parameters of intimate and family relations, and the framework of the external, singularist form of family life is followed according to one's conscience. This means that adult individuals may have sexual relations and cohabit with persons of the opposite or the same sex, and having children can be achieved either coitally or non-coitally (see Bernat 2002): within marriage, heterosexual cohabitation, private arrangements such as casual relations, home inseminations, or public and/or commercial services in fertility clinics providing that the legislation of the state in question permits this, or by adoption. This tension between two completely opposing views regarding what is included within the family-related rights of a person seems irresolvable in the age of international human rights law as a major source of advocacy, activism and litigation. At root, it probably is. However, legislators have made and constantly make choices concerning these views and their implications in many states, in Europe and North America and beyond. The singularist view of family as an institution governed by the distinction of sexes and generations is superimposed with and viewed in this study with the help of what Camille Robcis calls the "structuralist social contract" (2013: 61), a set of thought on the gendered aspects of kinship that have been historically moulded and argued in the French intellectual landscape with the help of Lévi-Straussian structuralist anthropology among other perspectives.

Robcis, a scholar of French intellectual history, has characterised this notion as a set of theoretical thought that was not intended as political or prescriptive by its forefathers such as Claude Lévi-Strauss, but it was developed into that direction in the interplay of 20th century French social theory and the arena of social and political debate in this polity. Manifestations of this strand of thought became particularly pertinent in public debates in France in the 1990s and the 2000s (Robcis 2004, 2007, 2013) up until recent years and the legal approval of same-sex marriage in France (Théry 2013). This set of thought is discussed in this study mainly through the work and views of Irène Théry (1996, 1997, 1998, 1999, see also 2013) and Françoise Héritier, an anthropologist of kinship studies (1985, 1996, 2009: see also *Commission des lois* 2013), who have acted both as academic commentators and high-level experts in relevant legislative processes in the French context in the 1990s and the 2000s (Robcis 2013: 251-257).

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<sup>10</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI. This was a key case in the European Court of Human Rights granting legal recognition of gender reassignment to post-operative transgender persons.



In turn, the pluralist view of family in this study is superimposed and viewed with theoretical concepts and notions taken from feminist relational theory (Leckey 2008; Nedelsky 2011) and relational sociology as a general theory of society and social life (Donati and Archer 2015; Donati 2011). Claims for recognition of family formation that bypass demands of status (married or not) and gender (male and female) that these pluralist views proscribe is an application of the principle of equality built into human rights thinking (see Hart 2009, 2012), as these kinds of demands will hardly disappear in the future. When judges and legislators evaluate the parameters of family life, for example, in the European Court of Human Rights, they are not just deciding about whether to grant public status and possible State subsidies to different forms of families; they are judging the universality of pluralist demands in the realm of family life. The particular historical trajectories of *démariage*, the privatisation of personal and family relations (Théry 1993), and the decriminalisation of homosexuality have led to a situation where people may form family relations by deciding what is the most preferred solution for themselves, at least on the micro-level (see Weeks et al. 2001).

The research question in this study is to examine how different forms of self-defined relational subjectivity have shaped the way how family relations and the protection of family life under Article 8 and Article 12 of the European Convention on Human Rights are seen today. The case law of the European Court presents an immensely intriguing timeline of social and legal change in the field of European human rights norms concerning family life. Examples of landmark judgements that present these forms of relational subjectivity are *Marckx v. Belgium* in 1979<sup>11</sup> concerning the recognition of unmarried mothers as official parents of their children, *Keegan v. Ireland* in 1994<sup>12</sup> regarding the status of unmarried fathers, *Christine Goodwin v. the United Kingdom*<sup>13</sup> in 2002 in giving post-operative transgender people the right to marry according to their reassigned sex and *E.B. v. France* in 2008<sup>14</sup> in arguing that non-heterosexual individuals are entitled to be evaluated as prospective adoptive parents on a par with heterosexual applicants. What is it that people are entitled to in the realm of family life and what is that family relations consist of? This is, indeed, one of the most essential sociological questions: What holds us together?

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<sup>11</sup> *Marckx v. Belgium*.

<sup>12</sup> *Keegan v. Ireland*, no. 16969/90, 26 May 1994, Series A no. 290.

<sup>13</sup> *Christine Goodwin v. the United Kingdom*.

<sup>14</sup> *E.B. v. France* [GC], no. 43546/02, 22 January 2008.

## **II ECHR CASE LAW FROM A SOCIOLOGICAL PERSPECTIVE**

How family relationships are constituted in the field of law is an intriguing and complex issue from both a practical and a theoretical point of view. This study looks at how adult-adult and parent-child relations have been dealt with in the case law focusing on family life in the European Court of Human Rights, an international legal institution providing authoritative articulations of human rights norms to be applied throughout Member States of the Council of Europe. The multi-level legal narratives described and analysed in the case texts selected for this study illustrate how relationships between people within the sphere of family life have been reckoned and regulated on the European level. In addition, it is examined what kind of reasoning is used to argue for and against the inclusion of various phenomena into the concept of ‘family life’ in contrast to mere ‘private life’ under Article 8 of the European Convention on Human Rights. In common parlance, ‘family life’ is a concept that refers to the everyday reality experienced by people who say they are part of the same family, a network of privileged close personal relationships. In the context of this study, it refers to the distinction made by the European Court between “family life” and “private life” under Article 8 of the European Convention, but it is also used as a term that perhaps captures better the level of human relationships in everyday life instead of the mere word “family”.

My data consists of two sets of texts: 1) relevant judgements from between 1979 and 2014 and 2) relevant inadmissibility decisions and reports from between 1973 and 2014<sup>15</sup>. Judgements act as primary data and offer key cases that I describe in more detail to illustrate the theme under analysis. This description and analysis is supported by other, legally and administratively less significant judgements, decisions and reports. The judgements and decisions have been pre-selected from the *Hudoc* case law database<sup>16</sup> of the European Court of Human Rights with the help of legal categories (Article 8 and Article 12 of the European Convention of Human Rights) and keyword parameters offered by the database (Article 8 and the keyword “family life”; Article 12 and no specific keyword). After this technical selection, relevant texts have been identified on the basis of the “Facts” section of each case and an evaluation on whether they discuss the establishment and recognition of existing or potential family relations, which are understood as adult-adult relations and parent-child relations. Thus, the cases discuss situations where an adult-adult relation or a parent-child is evaluated not the basis of its interpersonal qualities, but whether the biologically and socially defined subject positions give rise to a relation being defined as worthy of legal

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<sup>15</sup> See alphabetical case list in Sources and the chronological list in Appendix I.

<sup>16</sup> The case law database of the European Court of Human Rights, *Hudoc*, is available at <http://www.hudoc.echr.coe.int>.

recognition and protection. This has produced a corpus of case texts relating to 90 different cases of the European Court<sup>17</sup>.

Obviously, legal documents such as judgements and other case law can in no way present a full and adequate picture of the real-life situations behind the complaints made to the European Court in Strasbourg. According to Pierre Bourdieu, who could be described as a pan-sociologist who has written on almost all fields of social life, a certain degree of “structural censorship” (1991: 138) takes place always when events and facts of social reality are described with the help and for the purposes of specialised languages, such as legal language (see also Hastrup 2003). The main idea of my approach is to treat case law of the European Court as textual empirical data of its own kind: formulaic and limited but multilayered and both technically and narratively open to different kinds of analytical and critical readings. Broadly taken, case texts also describe a certain socio-legal if not an ethnographic reality. What I argue is that the textual analysis of the case law of the European Convention is a chronologically ordered and cumulative chain of reasoning about the meanings attributed to marriage, cohabitation, civil unions and various forms of creating parent-child relations in an inter-European authoritative discourse on human rights principles. On the other hand, ECHR case law is the primary and most empirical material available for analysing what family relations are taken to be in the realm of European human rights norms. ECHR case law is also rich material as it reveals the reception of the case in different levels of the judiciary of the respondent State (see Dembour 2006: 19-29).

As the data in this study is case law, it represents particular and extreme examples of the social and legal situations of individual applicants in Member States: for example, when *Marckx v. Belgium* was decided in 1979, the legal status of children born to unmarried mothers was not so dire in many other Member States of the Council of Europe as it was in Belgium<sup>18</sup>, but it was this judgement that made the outcome, the prohibition of discrimination of children on the basis of the marital status of their birth mothers, a binding human rights norm. When processing these complaints, the administrative machinery of the European Court has processed applications made by individuals, their lawyers and supporting organisations<sup>19</sup> into legally comprehensible and comparable narratives and sets of facts upon which human rights norms expressed in the European Convention of Human Rights are applied. As a supranational legal institution, the European Court and its adjacent institutions have established a system of signification and a technical language of their own: a legal and administrative culture of human rights

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<sup>17</sup> See Appendix I for a timeline of the data. Case law relating to cross-border family reunification issues and custody and access disputes have been left outside the scope of this study, as they constitute vast areas of analysis of their own.

<sup>18</sup> See *Marckx v. Belgium*, para 41.

<sup>19</sup> On the role of supporting and intervening non-governmental organisations in litigation in the European Court of Human Rights, see Hodson (2010).

maintained and perpetuated by the Council of Europe, the European Court and networks surrounding them. These networks are constituted by everyone in, around and outside the Member States (Dembour 2006) who read, study, disseminate and litigates on the basis of existing case law, communicated through the Internet, academic publications and media (see van der Vet 2014.)

A global culture of human rights thinking and advocacy has been studied and analysed by many anthropologists (see e.g. Merry 2006, 2010; Wilson and Mitchell 2003). Iris Jean-Klein and Annelise Riles, anthropologists who have written widely on human rights, note that the “subject of human rights has without a doubt become one of the fastest growing arenas of anthropological work” (2005: 173). This is much due to the use of anthropological or social scientific expertise in theoretical and practical human rights work. However, it has also led to the study of the field of human rights as forming various organisational or ideological cultures of their own, of which the European Court of Human Rights is a prime example. Indeed, they point out that “...recently, perhaps because of anthropologists’ newfound access to human rights actors and institutions in their capacities as experts, the discipline has discovered human rights cultures as ethnographic subjects in their own right” (2005: 182). Following the work of Riles done in *The Network Inside Out* (2000), the culture I refer to is more a network of circulated ideas, norms and documents that embody this immaterial and transnational set of norms. This has built up and maintains the system that is known as the European regional system of human rights protection: the Council of Europe and the European Court of Human Rights. With the help of means of communication available today, the judgements and decisions given by the European Court are available to a vast audience of actual and potential applicants, legal practitioners, scholars, students, journalists and human rights activists, to be disseminated, consumed, appraised and criticised, referred to and reused in a variety of contexts. This study, in its own part, is also an artefact of this European culture of human rights. It is through this network of norms, ideas and knowledge that this particular culture comes into being and affects the everyday lives of ordinary people through case law and legislative changes in Member States of the Council of Europe.

In a theoretically ambitious and comprehensive analysis of the case law of the European Court of Human Rights as a legal phenomenon, Marie-Bénédicte Dembour (2006), a lawyer and legal anthropologist working in Britain, has analysed selected ECHR case law from realist, utilitarian, Marxist, particularist and feminist perspectives, and shows that besides administrative efficiency and the sanctioning of States Parties in their human rights commitments, the institutionalisation and proceduralisation of human rights can have adverse effects, too. Those who can afford the material and personal costs of seeking justice from a supranational court tend to be the ones who benefit from its existence. In this analysis, Dembour argues that human rights may be characterised in four ways, or under four “schools of human rights”: given (natural), agreed upon (deliberated), fought for (a form of protest) or

talked about (discursive, even nihilist). The view of rights as given refers to a belief system and a deity behind it that has dictated these rights to us; the view of rights as deliberated refers to the results of a multilateral political process; the protest school wishes to see rights as radical tools to achieve new political ends and the discursive school sees them as speech but as tools for political change nonetheless (Dembour 2006: 254-255, see also Dembour 2010: 11)

The judgements and decisions analysed in this study have been selected so that they offer description and narratives of legal conflicts between individuals and States and the extent to which they engage in evaluating the existence or denial of recognised family relations between people. To a certain extent, a case has to offer 'ethnographic' or anthropological knowledge on how a particular State has defined legally valid family relations. This means that the documents analysed describe complaints which deal with the formation and recognition of existing or potential family relationships, relations between individuals who claim that they share a relation of family life and want this relationship to be accorded privileges on a par with easily or automatically recognised family relationships, such as opposite-sex marriage and children born within it whose parentage is not disputed. Due to the subject matter of this study, the field of private and family life, it can easily be placed in the fields of multidisciplinary human rights studies, legal sociology and the sociology of family and intimate lives. However, a similar analysis could have been performed with data from any other authoritative body dealing with the interpretation of what kind of relations can and should be considered as family relationships, privileged personal relationships in relation to the State.

The analysis undertaken in this study can be approached from a variety of perspectives, and feminist legal sociology inspired by anthropological theories of kinship and relational sociology has been the perspective chosen. By examining judgements and decisions from the European Court relating to the notions of right to respect for family life and the right to marry, I hope to be able to give a critical account of how the European Court has viewed the notion of family thus far, and where these developments seem to be pointing to. The doctrine of the dynamic (also known as contextual or evolutive) interpretation of the European Convention of Human Rights, developed by the European Court itself, and its implications to changing norms relating to family and marriage provides the main interest of this study also from a sociological and not just from a legal perspective. The dynamic interpretation of the ECHR was articulated by the European Court the judgement of *Tyrer v. the United Kingdom* in 1973 where it was stated that the Convention is "living instrument to be interpreted according to present-day conditions"<sup>20</sup>, if a 'European consensus' can be said to be emerging on a particular issue (Ovey and White 2006: 46-47).

As those versed in ECHR case law know, this is not the whole story: Member States are also given a wide 'margin of appreciation' to take into

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<sup>20</sup> *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, para 31.

account the particular circumstances of the respondent state and its legal system (Ovey and White 2006: 53). However, the changing and contingent interpretation of the ECHR is what makes its case law so interesting also from a sociological point of view. The analysis of the research material, case law selected on the basis on holding content that is relevant to the existence of potential and established family relations, helps in mapping out what are the limits of the notion of family in European human rights jurisprudence. Despite their formal nature, legal texts can provide immensely interesting qualitative data if read and analysed as legal narratives. Decisions and judgements from the ECHR contain hugely interesting substance also from the point of view of sociology and anthropology, especially regarding the formation and acknowledgement of close relations between people. At the time of planning this study in the mid-2000s, the approach of reading legal narratives from a critical sociological viewpoint was greatly inspired by how Derek McGhee has analysed English case law relating to asylum claims on the basis of sexual identity (2001). Similar work on the case law of the European Court of Human Rights has been done by Paul Johnson, a legal sociologist (2013, see also 2015a, 2015b, 2014, 2012a and 2012b).

The hypothesis that guided this study in 2007 at its inception was that fundamental changes in the family law in some Member States of the Council of Europe, namely civil unions and same-sex marriage, would pose a continuous and serious challenge to singularist conceptions of “the right to respect for private and family life” (Article 8 of the European Convention on Human Rights) and “the right to marry and to found a family” (Article 12 ECHR) and compel human rights institutions such as the European Court to fundamentally reconsider what counts as family life. To a large extent, this has already happened, as in the case of *Oliari and others v. Italy* in 2015<sup>21</sup> Member States are advised to create legislation that makes it possible for same-sex couples to have their relationship recognised by law. The change that has taken place during the last ten years has been in many ways astonishingly quick taking into consideration the institutional design of the European Court. Unfortunately, a wider embrace of minorities might not be easily digested in the national political and legal systems of Member States, a perennial problem and tension between supranational human rights jurisprudence and state sovereignty. What is argued with the help of the empirical data analysed in this study is that relationship recognition (alliance) and different forms of instituting parental relations (filiation) should perhaps be even more clearly distinguished from each other compared to marriage of yesteryear where the assumption of paternity is key compared to recognised couplehood (interview of Théry in Grosjean 2012). Opposite-sex cohabitation and births outside marriage have been contributing to the divergence of marriage and filiation for a long time (see Kiernan 2001, Bradley 2001), and political mobilisation

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<sup>21</sup> *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015. As this judgement was given in 2015, it is not part of the data in this study, which is from the 1979 to 2014.

arguing for a gender-neutral ethos of equality in family law and legislative changes that have taken place in many Member States of the Council of Europe are all pointing this way.

### III STRUCTURE AND PURPOSE OF STUDY

This study is divided into six substantive chapters in addition to the Introduction and Conclusion. Chapter 1, the first main chapter, offers a theoretical and conceptual background to the analysis undertaken in this study. It starts with the tripartite notion of alliance, consanguinity and filiation (Lévi-Strauss 1958: 56; 1973: 7) inspired by mainly terminological debates in classical anthropological studies which offer a frame for the thematic classification and analysis of my data. This is followed by more contemporary anthropological and sociological debates on the role of gender and sexuality in instituting kinship positions in the field of law, historically and politically situated in French public and academic debate on legislating gender-neutral civil unions to all couples (Pacs) in the late 1990s and same-sex marriage in the early 2010s. French academic debate has been chosen as the connection made in this discourse between anthropological thought and modern-day political debate on what family is comes out as most pronounced, as in other European polities reference to disciplines such as anthropology and psychoanalytical theory has been less common (see Robcis 2013). These two sets of anthropological thought and debate act as a backdrop for developing the main concept developed in this study, “relational subjects”, named in the work of Nicola Lacey (1996: 150) and developed with the notion of “contextual subjects” in family law and administrative law (Leckey 2008). These debates are complemented with what “relational” means in a related but separate field of inquiry, relational sociology as a general theory of society (see e.g. Emirbayer 1997; Powell and Dépelteau 2013; Donati 2011).

In Chapter 2, I proceed to the conceptual history of the notion of family in human rights documents of the United Nations, especially the Universal Declaration of Human Rights (1948) and the drafting history of the definition of family in it. This is followed by Chapter 3, which describes the concept of family in European human rights documents, how the case law data in this study was selected and analysed and what kind of an analytical tool the European Court itself offers in its division of relations into biological, legal and social relations. In the remaining Chapters (4, 5 and 6) case law from the European Court of Human Rights is analysed under the rubrics of alliance (4), consanguinity (5) and filiation (6). Chapter 4 pertains to dyadic intimate relationships between adults and the process of *démariage* (Théry 1993), that is, the undoing, privatisation and intimisation of marriage and cohabitation. In Chapter 5, I analyse case law relating to biologically grounded maternity and paternity, the building blocks of gendered parenthood. Chapter 6 turns to case law relating to the intentional creation of family relations through two

different measures, adoption and assisted reproduction. Due to the richness of the case law discussed, the same cases might surface in different contexts and chapters.

The analysis of the case texts proceeds primarily with the help of the conceptual tools developed for the analysis. The division of relations into 1) *biological*, *legal* and *social relations* acts as the first bundle of concepts that has been used by the European Court itself, too<sup>22</sup> (see Lagoutte 2003; Schwenzer 2007; Meyer 2006). This is easily complemented and put into counterpoint with gender, as it is an evident dimension that operates in the case law but is seen as so evident that it needs no specific mention and explanation<sup>23</sup>. A further layer of analysis is added with textual and linguistic analysis focusing on the representation of the narratives and facts of the case in legal language, the construction of credible categories of relations and evoking signs of an existing socio-legal understanding of relations. In addition to qualitative textual analysis, the analysis done in this study is based on a relational approach of “restructuring relations through rights” (Nedelsky 2011: 313, 2012) reflected on the case material and, to a certain extent, on ‘counterpoint’ (Brown 2002) as a style of writing, a form of criticism that aims as contrasting and highlighting alternatives to the perspectives put forward in the data.

The purpose of my study is twofold. On the one hand, I wish to examine the mutually influencing relationship between international law and national legal cultures on the European level in the socio-legal conceptualisation of what kinds of human relations count as family life. Decisions of the European Court of Human Rights are binding on Member States and require them to change their national legislation accordingly, while the Court grounds its jurisprudence on doctrines such as “European consensus” (Ovey and White 2006: 235) on particular issues. On the other hand, I wish to offer a sociologically informed critique of the making of human rights norms regarding marriage, family and family life in the jurisprudence of the Convention and in this European ‘culture of human rights’, and consider what kind of implications the changes that are underway have for gender equality and the politics family-making in today’s Europe. The aim is to trace how different forms of relations between individuals are presented in the relevant case law and how they are given recognition or rejected.

During the time period under study, 1979–2014, norms regarding what family life is expected to be and what kind of relations are given legal protection in the case law European Convention have been subject to enormous change due to the doctrine of dynamic, evolutive and contextual interpretation of the Convention practiced by the European Court, which is

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<sup>22</sup> *Kroon and Others v. the Netherlands*, no. 18535/91, judgment of 27 October 1994, Series A no. 297-C.

<sup>23</sup> As noted in *X, Y and Z v. the United Kingdom* [GC], 22 April 1997, Reports of Judgements and Decisions 1997-II of 27 October 1994, Series A no. 297-C.



also based on an “interpretive ethic” that seeks to provide a moral evaluation of the case at hand and not to dwell on the original intentions of the drafters of the European Convention (Letsas 2010: 509). The aim of this study is to offer a critical, feminist and sociological reading of relevant ECHR case law concerning the establishment of legally and bureaucratically relevant relations in the sphere of “family life”, a privileged sphere of relations within a larger realm of “private life” in the case law of the European Court. With getting to know the history of the concept of family and how family relations are defined today within a supranational layer of normative commitments between States and individuals interacting with them we may unravel something more about social ties, the main object of study of sociology and the intangible glue that holds people together.



# 1 KINSHIP, GENDER AND RELATIONAL THINKING

*The exchange of women is likened to the exchange of words, and this particular linguistic circuitry becomes the basis for rethinking kinship on the basis of linguistic structures, the totality of which is called the symbolic. Within that structuralist understanding of the symbolic, every sign evokes the totality of the symbolic order in which it functions. Kinship ceases to be thought in terms of blood relations or naturalized social arrangements but becomes the effect of a linguistic set of relations in which each term signifies only and always relation to other terms.*

Judith Butler (2000: 41)

How and with the help of what kinds of concepts and theories to analyse change in the way legal family relations are understood in Europe today? In this chapter, I offer an account of certain anthropological and sociological concepts and lines of debate guiding and framing the approach adopted in this study. These concepts and debates have helped in viewing what ‘family life’ stands for and what kind of social relations are regarded as ‘family relations’ in a contemporary European culture of human rights exemplified in ECHR case law. The main argument presented in this chapter is that a traditional view of the family, apart from viewing it through the normative prisms of natural law and theology, can be analysed and contextualised with the help of structuralist anthropological theory and juxtaposed with views from feminist political and legal theory and views from relational sociology in order to examine how family relations are understood in European human rights jurisprudence today.

The notion of a “structuralist social contract” is a notion developed by the historian Camille Robcis (2013) after analysing French historical and theoretical debates of the 1990s and 2000s on the Republican and gendered aspects of family formation. Robcis sought out, among other themes, to trace the roots of what has been referred to as the “symbolic order” of kinship in French debates around civil unions (*pacte civil de solidarité*, *Pacs* legislated in 1999) and same-sex marriage in the late 20<sup>th</sup> and early 21<sup>st</sup> century. The “symbolic order” is a notion that harks back, in these debates, mainly to structuralist anthropology influenced by the thought of Claude Lévi-Strauss as expressed in the *Structures élémentaires de la parenté* (1949) and *Anthropologie structurale* (1958). The thought of the psychoanalytical theorist Jacques Lacan is often placed in the continuum of the symbolic order from Lévi-Strauss to contemporary debates (Robcis 2007, 2013, see also Hart 2009). This study focuses on the role of Lévi-Strauss and the sociological and anthropological import brought to those debates by Irène Théry and Françoise

Héritier. This notion of a “symbolic order” of kinship and family took up an existence of its own in the debates in France in the late 1990s as a binary order of gendered kinship positions that, according to its singularist proponents, was beyond conceptual modification (Robcis 2013).

In turn, a pluralist view of the family, I propose, may be viewed through the prisms feminist and queer theory as has often been done (Rubin 1975; Butler 2000, 2002), feminist political and legal theory (e.g. Lacey 1995, 1996; Leckey 2008; Nedelsky 2011) but also the with the help of a general theory of sociology, relational sociology (Donati and Archer 2015; Donati 2011, Crossley 2010). This perspective provides the possibility for a shift from the dichotomy of status (adherence to a preconceived order of kinship and gender) to identity (feminist and non-heterosexual political mobilisation in family issues) to relations between individual legal subjects and between individuals and States. In short, I argue that a sociological reading of the case law of the European Court of Human Rights influenced by a relational approach (see Nedelsky 2011, 2012) concerning claims made about family life produces a pertinent analysis of what constitutes “family life” in Europe today from the perspective of law and human rights.

## 1.1 ALLIANCE, CONSANGUINITY AND FLIATION

*Of course, the biological family is ubiquitous in human society. But what confers upon kinship its socio-cultural character is not what it retains from nature, but, rather, the essential way in which it diverges from nature. A kinship system does not consist in the objective ties of descent or consanguinity between individuals. It exists only in human consciousness; it is an arbitrary system of representations, not the spontaneous development of a real situation.<sup>1</sup>*

*Claude Lévi-Strauss (1967: 48-49)*

In recent years, there has been a certain trend of reassessing and reappraising the work of Claude Lévi-Strauss, the ‘father’ of structuralist anthropology (see Doran 2013) whose work has been appropriated by a range of scholars from anthropology to cultural studies and literary theory. Apart from this trend, the theoretical work and central concepts of Lévi-Strauss’s work from the mid-1900s were cited widely in political debates concerning civil unions, same-sex marriage and family formation by same-sex couples in France in the 1990s to

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<sup>1</sup> Original text in French: “Sans doute, la famille biologique est présente et se prolonge dans la société humaine. Mais ce qui confère à la parenté son caractère de fait social n’est pas ce qu’elle doit conserver de la nature: c’est la démarche essentielle par laquelle elle s’en sépare. Un système de parenté ne consiste pas dans les liens objectifs de filiation ou de consanguinité donnés entre les individus; il n’existe que dans la conscience des homes, il est un système arbitraire de représentations, non le développement spontané de situation de fait” (Lévi-Strauss 1958: 61).

the 2010s. In these debates, a widely surfacing but rather opaque concept was the notion of a “symbolic order” of kinship, a system of signification in which men and women may only inhabit spousal, reproductive and parental roles that are open to them on the basis of their approved physical sex. (Confusion between generations has not really been an issue in these debates.) In other Western polities the same fervent debates on homosexuality and the concepts of couple, marriage and family have mainly been argued with the help of arguments from Christian dogma, statistical and other empirical findings from psychological and social scientific studies (Robcis 2013: 263-4) or purely subjective and conscience-related arguments.

France provides an interesting exception to this with a political context where arguments from anthropological theory as well as psychoanalysis have occupied centre-stage positions in influential arenas such as parliamentary debates, national daily newspapers as well as academic debate relating to a wide range of issue relating to gender, sexuality and reproduction (Robcis 2004, 2013). In my analysis of the tension between traditional and pluralist views of family relations I take this historically and politically specific deployment of structuralist anthropological theory as an inspiration to analyse what it is that connects law and anthropology within the traditional view of what family is and stands for. The tensions appear on a variety of axes: historical versus ahistorical, descriptive versus prescriptive, natural law versus positivist law. As debates on the significance of the ‘symbolic order’ and its applicability to recent and current legislative projects demonstrate, structuralist anthropology is not completely outdated or absent from contemporary debates anthropological research on families and family law. But is there anything there that might be useful for analysing modern-day developments?

Robcis has termed the set of theoretical thought appropriated from the anthropologist Claude Lévi-Strauss and the psychoanalytical theorist Jacques Lacan, often identifiable by references made to the ‘symbolic order’, as “the structuralist social contract”. Robcis argues that both Lévi-Strauss and Lacan were more concerned with developing their theoretical thinking than applying their theories to practical political debates (2004: 120, 2009: 5). She maintains that it was through the popularisation of their thought through some key “bridge figures” (2013: 6) that some of their most difficult and highly theoretical concepts were appropriated into political and legislative debates in contemporary France. In debates concerning gender, homosexuality and family in France, the focus has curiously been a great deal on theoretical debate and on the potential effects of allowing e.g. same-sex marriage to the ‘taint’ the fabric of the nation (universalist Republicanism), the public order or public policy (*ordre public*) or the psychic construction and well-being of the children and adults concerned instead. (Robcis 2013.)

Lévi-Strauss has been criticised for this theory for presenting women as inferior objects of exchange, for example, by Gayle Rubin in her famous essay *The Traffic in Women: Notes on the Political Economy of ‘Sex’* (1975, see also

Favret-Saada 2000). Rubin built her essay on criticising both the theory of Lévi-Strauss but also the psychoanalytic tenets of Jacques Lacan and the importance of the Oedipal complex in the foundation of what is named here as the symbolic order of kinship. Later, in her influential book *Gender Trouble*, Judith Butler (1990) built on Lévi-Strauss and Lacan in mapping out her theory of the heterosexual matrix, a “grid of cultural intelligibility” (1990: 6), which somewhat resembles the notion of the symbolic order of kinship as a cultural ideal. However, Lévi-Strauss has noted in his earlier work as well as in recent years that his theory is a model where the position of women and men as actors and objects is not the crux of the matter. However, according to him, in practice, ethnographic evidence shows that it is predominantly men who exchange women (1958: 56). Especially in the context of the *Pacs* debates, he stressed that the model would (theoretically) function just as well with women exchanging men or groups exchanging men or women (2000: 717).

What is there in Lévi-Straussian thinking that might be helpful in analysing kinship as a legal and a human rights phenomenon, emphasising how kinship is manifested as rules and structures? Lévi-Strauss offers a classical characterisation of the core of human kinship in one of his main collections of essays, *Anthropologie structurale* (1958). In an essay on applying structural analysis from Saussurean linguistics anthropology and ethnographic data<sup>2</sup>, he proposes that the simplest structure of kinship consists of relations between 1) siblings, 2) spouses and 3) parents and children. This emanates from his central thesis that the incest prohibition, the threshold in the passage from nature to culture and human society, leads to the rule of exogamy (“marrying out), according to which ‘men’ exchange their ‘sisters’ with men from other groups, leading in turn to the alliance of two groups through a union of a man and a woman who are not siblings. Within this union they have a child or children, which creates relations of filiation between parents and children. This, according to Lévi-Strauss is *the* basic “element of kinship” (Lévi-Strauss 1958: 56).

The idea of the atom of kinship has been subject to some debate within classical anthropology, spilling over to psychoanalytical theory as well (Green 1977). In this essay, Lévi-Strauss took up the work of A. R. Radcliffe-Brown, a British anthropologist, who had described the relations between a father, mother and their child(ren) as the core of kinship. To Radcliffe-Brown, relations within what he calls the “elementary family” (or close to what is often called the “nuclear family”), are relations of the first order. Relations of the second order are those that combine two elementary families, such as relations between the husband and his siblings and a wife and her siblings. If followed, this line of thinking can be applied to identify relations of the third, fourth, fifth and the umpteenth order when genealogical information is available. (Radcliffe-Brown 1941: 2, cited in Lévi-Strauss 1958: 60-61). Lévi-Strauss stresses that this elementary family would be nothing without an alliance

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<sup>2</sup> Chapter 2 in volume 1 of *Anthropologie structurale* (Lévi-Strauss 1958).

between the two groups, joining the father and the mother, or the husband and the wife together (1958).

Thus, Lévi-Strauss (1958) sets off from the viewpoint that alliance, not descent (or filiation), is the foundation of kinship, as it is a relation of exchange between kin groups. Motivated by the rule of exogamy, men from different kin groups enter into relations of reciprocity and alliance through the exchange of women for the purposes of procreation and the exchange of various material and immaterial goods. This is “symbolic” to the extent this system of exchange (or other systems of gift-giving in classical Mauss-inspired anthropology) is played out *like* a language, where each person, either the one who exchanges or who is exchanged, can be described in terms which relate to his or her place and role in that system. In Lévi-Strauss’ words, “a kinship system is a language”<sup>3</sup> (1958: 58). The idea in Lévi-Strauss’ characterisation in what differentiates humans from animals is the arbitrary nature of linguistic signs, which kinship terminology also belongs to. In addition he stressed that terminology and linguistic signs were not at the heart of his analysis, but the *relations* between these signs (1958: 57).

The idea that a kinship system does not consist of objective relations of filiation (or descent, depending on the terminology) or consanguinity but of arbitrary meanings, resonates with contemporary debates on what kind of relations can be subsumed within the categories of family relations or family life. Broadly, the forms of kinship that count in conceptualising close personal relations in this context are dyadic and intimate adult relations and parent-child relations. These kinds of relations also often constitute a bi-generational household in contemporary industrial societies. In Lévi-Strauss’ words:

*... pour qu’une structure de parenté existe, il faut que s’y trouvent présents les trois types de relations familiales toujours donnés dans une société humaine, c’est-à-dire: une relation de consanguinité, une relation d’alliance, une relation de filiation; autrement dit, une relation germain à germaine, une relation d’époux à épouse, une relation de parent à enfant.*<sup>4</sup>

Claude Lévi-Strauss (1958: 56)

*In order for a kinship structure to exist, three types of family relations must always be present: a relation of consanguinity, a relation of affinity, and a relation of descent – in other words, a relation between siblings, a relation between spouses, and a relation between parent and child.*<sup>5</sup>

Claude Lévi-Strauss (1967: 43)

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<sup>3</sup> “Le système de parenté est un langage...” (Lévi-Strauss 1958: 58).

<sup>4</sup> Emphasis added.

<sup>5</sup> Emphasis added.

As the quotes above in English and French demonstrate, the key terms alliance and filiation in French were translated with ‘affinity’ and ‘descent’ in English. A closer look at these terms with the help of the *Oxford English Dictionary* and a French lexicon shows that there is a lot of overlap in the meaning of these terms in both French and English, which makes the translation of these terms from either language rather challenging. Alliance, according to the *OED*, would be synonymous with everything conceivable such as marital relations, common parentage and consanguinity (Oxford English Dictionary 2012, “alliance”), which makes it understandable that alliance in French would be translated with affinity, which refers more precisely to relations created by marriage and is the antonym of consanguinity. However, alliance is useful in emphasising the aspect of being allies, the act of allying together in contrast to ‘affinity’, which also refers also to e.g. companionship, friendliness and attraction (Oxford English Dictionary 2012, “affinity”).

Consanguinity, in English, refers essentially to “the condition of being of the same blood” (Oxford English Dictionary 2012, “consanguinity”). In French, it is defined as the relation of the children of the same father, or broadly speaking, as descent from the same ancestor (Ortolang 2012, “*consanguinité*”). Filiation, in English, is a less widely used term than in French. For the purposes of this study, it will suffice to distinguish that filiation refers to “the fact of being the child of a specified parent” (Oxford English Dictionary 2012, “filiation”) and more precisely, that this is a legitimate and/or recognised relation, and that descent refers to genealogical relations that go beyond one generation. For example, in the state of Quebec in Canada, where family law has in many respects been rewritten completely in recent times when it comes to same-sex marriage and opening adoption for same-sex couples, in legal usage “filiation” is characterised in English as follows:

*Filiation is the relationship which exists between a child and the child's parents, whether the parents are of the same or the opposite sex. The relationship can be established by blood, by law in certain cases, or by a judgement of adoption. Once filiation has been established, it creates rights and obligations for both the child and the parents, regardless of the circumstances of the child's birth.*

*Ministry of Justice of Quebec (2003, no pagination)*

Thus, filiation is what constitutes the relationship that binds a child to her or his parents. It is often constituted upon consanguinity (shared genetic origin) and alliance (e.g. assumption of paternity within marriage). In the absence of these, legal techniques such as adoption may be resorted to.

In this study, I have taken *alliance*, *consanguinity* and *filiation* as guiding thematic categories under which I organise and analyse my data. 1) Alliance is taken to refer primarily to intimate unions between two adults, be they of formal (marriage, civil unions) or informal kind. 2) Consanguinity offers the platform for analysing the significance of blood relations, and more



specifically gendered parent-child relations, maternity and paternity and to what extent they are governed by the principle of consanguinity. Consanguinity often comes close to what are called biological relations, but in this study, with biological relations I do not refer to just genetic and gestational relations, but the ensemble of these between the woman and man from whom a child originates from (see Chapter 3.2). Even though these parent-child relations already belong under the rubric of 3) filiation, or organising intergenerational relations, filiation in the contexts of adoption and assisted reproduction, fields where relations of consanguinity often do not exist, highlights the socially constituted nature of these relations and forms a third category of analysis. These three areas of analysis correspond to the three empirical chapters in this study (Chapters 4, 5 and 6).

## 1.2 SYMBOLIC ORDER OF KINSHIP AND GENDER

*Some of France's most prominent anthropologists, psychoanalysts, legal scholars, and sociologists were called before the Assembly, the Senate, and the courts, to discuss the meaning of the couple, the role of marriage in society, and the state of the family... Within these scholarly disputes, two names surfaced with remarkable frequency: that of the anthropologist Claude Lévi-Strauss and of the psychoanalyst Jacques Lacan. Thus, in the midst of parliamentary debates and procedures, legislators began alluding to some of the most obscure and difficult concepts of Lévi-Strauss and Lacan, such as the symbolic order, the Oedipus complex, castration, psychosis, the Name-of-the-Father, the anthropological invariables of society, and the prohibition of incest.*

*Camille Robcis (2004: 4-5)*

In debates concerning the French equivalent of civil unions, *Pacte civil de solidarité* or *Pacs*, legislated in 1999, and same-sex marriage, legislated in France in 2013, several prominent French intellectuals argued on many occasions that opening marriage and filiation to same-sex couples would be against the “symbolic order” relating to language, culture, gender and intelligibility (Robcis 2004, 2007 2013). At its barest, this notion refers only to symbolic thought and expressing various ideas with the help of linguistic signs, words. However, in these debates, it was used to argue the point that marriage is for heterosexual persons and that legally recognised families should be composed of a father, mother and children. In this sub-chapter, I give an outline of how the notion of the symbolic order emerged in contemporary political and legislative debates relating to marriage and family in France in the late 1990s and early 2000s.

What I wish to find out is whether Irène Théry's idea of the law as an embodiment of the symbolic order of kinship (see Théry 1997, 1998) is applicable to ECHR case law not just from France (see Hart 2009) but from

other States as well, and whether the concept of the symbolic order is useful in trying to identify what debates surrounding families formation by non-heterosexuals express about the underlying patterns of recognition of family life in general in European States. The *Pacs* proposal and its predecessors such as CUS (*contrat d'union sociale*) sketched various possibilities for a limited form of “quasi-marriage” and contained no suggestions to open the realm of descent or filiation through adoption or artificial procreation to same-sex couples (Théry 1997, 1998). However, these proposals on civil unions sparked vivid debate in their time on the limits of acceptability of family formation and the advent of legally recognised parenting by same-sex couples and homosexuals in general which continues today as well.

What distinguished the debate from similar ones in other European countries was how certain strands of French psycho-social theory were evoked in it and how intellectuals such as philosophers, anthropologists, psychoanalysts and sociologists took part in the debate, saying that it was against the symbolic order if same-sex couples were granted the possibility of shared legal parental relations. (Robcis 2013.) The symbolic order of kinship, family or marriage, in the texts where it has appeared (academic, newspaper and web articles, opinion pieces, interviews, parliamentary debates), has often been left to stand on its own. The use of this concept acts as a bridge between anthropological knowledge, its variability and the changing nature of human institutions such as kinship and law. It sheds light on why a clear-cut, binary system of gendered family relations is held so dear by many and why potential and actual change, such as legislating same-sex marriage, is argued to be both a culmination of and an affront to human rights, depending on the interlocutor. It has also offered an intellectualised, secular alternative to religious doctrine for those arguing against civil unions and same-sex marriage. (Zaoui 2005.)

Irène Théry was an active commentator during the *Pacs* debate, and not least because she was asked by the Minister for Justice to write a report on the reform needs of family law in France. The report, *Couple, filiation et parenté aujourd'hui* (Théry 1998), is still today a key reference for understanding these debates. However, Théry devotes rather little space to the problematic of the “symbolic order” vis-à-vis same sex unions and non-heterosexual parenting in this publication. She gives a more thorough account in an article entitled *Le contrat d'union sociale en question* (1997) published in the Catholic socialist journal *Esprit*. According to Eric Fassin, a French sociologist, the use of the expression “symbolic order” proliferated in public debates following the simultaneous publication of this article in *Esprit* and *Notes de la Fondation de Saint-Simon*, a publication of a Paris-based think tank (2001: 225, note 24). In the article Théry analyses the *contrat d'union sociale*, CUS, not a concrete proposal but rather the “juridical idea” of a civil union. The CUS would have encompassed any kind of partnership between two people without regard to prohibited degrees of relationships. The eventual *Pacs* bill did not include this and was restricted to perceived sexual relations between two adults. Central to

the article was Théry's concern regarding the "passion of desymbolisation" (1997: 175) of proposals such as the CUS. Her discussion on symbolic differentiation between the sexes focused on three main points: the couple, gender and filiation. To Théry, the law had an instituting function: it expresses and regulates "major anthropological distinctions" (1997: 174), particularly the difference between the sexes and differences between generations. This is why, according to this view, marriage and family are not private institutions, but public, as they form the social and institutional framework for the reproduction of society.

Théry found support for her views in the jurisprudence of the European Court of Human Rights, which has since its 1981 judgement *Dudgeon v. the United Kingdom* from 1981<sup>6</sup> maintained that homosexuality must be decriminalised in order to protect the right to respect for private life. However, in the Court's jurisprudence, the sphere of family life, despite encompassing unmarried parents, children born outside marriage and various other situations that used to be regarded outside the sphere of legitimate family relations, did not for a long time extend to homosexual relations between adults or relations between social parents and their children in family units formed by same-sex couples even on the *de facto* level before the judgement of *Schalk and Kopf v. Austria* in 2010 (see e.g. Johnson 2013: 113-118). According to Théry (1997: 173), the symbolic order was not about the classification of factual situations but the classification of types of human relationships. To her, it was about the level on which differences between people are played out: the level of the law or the level of facts, shared significations or private choices, the symbolic order or concrete situations. According to this view, the function of the law is not to respond to social phenomena arising from specific historical and political contexts, but to set boundaries to people on what can be done: in the *Pacs* debate, demands for the recognition of family relationships of people belonging to sexual minorities were seen by the proponents of the symbolic order as a wish to use the law as a vehicle for private desires. (Théry 1997.)

In this essay, Théry (1997) states clearly that in her view, "desymbolisation" in the relations between the sexes cannot be regarded as progress. A symbolised relationship carries the idea of sexuality belonging to the relation between two people of the opposite sexes. A husband and wife or a cohabiting couple of the opposite sex are in a relation that carries the symbolic value of potentially being able to reproduce the human species. For Théry, the CUS desymbolised this relation of 'erotic tension' stemming from difference and the desire for the other. Théry derives much of her thought between the masculine and the feminine from Françoise Héritier when she states that "this symbolic of the genders, of the masculine and the feminine, exists in all human societies: it is through which culture gives sense to the sexed characteristics of the living species that we are, but to which we are not reducible" (1997: 178).

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<sup>6</sup> *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45.

Théry held up the distinction between homosexuality and heterosexuality as a question of private desires against public family life that reproduces society. She, much in line with the case law of the European Court of Human Rights at the time, wished to grant homosexuals civil and social rights as long as it all remains in the realm of private life. Homosexuality pertained to the individual, heterosexuality to relatedness, i.e. genders and generations. To push the limits a little bit, one could say that “*liberté, égalité et fraternité*” used to apply to everyone, as long as they were among the deserving categories: republicanists, universalists, heterosexuals – or as long as they worked, ate, drank and reproduced as the Republic desired (see Butler 2002: 22).

In an interview with the magazine *Prochoix* in September 1998, Théry explained her view in even simpler terms. She stressed that she was not opposed to homosexuals raising children in situations where they had been born in a previous heterosexual relationship or been adopted. She explained that it was only in a situation where two persons of the same sex would adopt that she was opposed: this would mean an end to the mixity (*mixité*) in our genealogical system. A genealogical system, she explained, is not the same as nature, it is a symbolic system within which we give significations to biological realities. The Euro-American genealogical system is distinguished by cognatic descent, that is, we reckon relatedness through both the father and the mother. Having two mothers or two fathers would de-institute the difference of the sexes in our kinship system (Fourest 1998: 6). However, later in the interview Théry stated that she did not think that the symbolic order is ‘immutable’. With this she seems to be referring to the fact that her line of thinking recognises that the concept of couple encompasses same-sex couples as well.

Marcela Iacub (1998, no pagination) a legal historian, took up Théry’s article discussed above and criticised the application of the concept of the symbolic order. Iacub criticised Théry and other ‘iuslaccanian’ thinkers for not making a clear enough distinction between the legal subject and the person. According to Iacub, the subject of law is an abstract individual, an intersection of rights and obligations that correspond to a person, but the subject of law is not a person in flesh and blood. The fact that the subject of law has been gradually de-sexed due to more egalitarian aspirations in the field of civil rights does not mean that actual persons would somehow cease to exist as men and women or to act out qualities perceived as feminine or masculine. Desexualisation of the subject of law does not mean the desexualisation of men and women, if that is what the preservers of the symbolic order would have been afraid of. As Iacub notes in her critique of Théry, evocations of a timeless symbolic order delegitimise the possibility of innovation, social change and egalitarian aspirations in the field of family policy and family law. (Iacub 1998.)

In 1998, Françoise Héritier, a prominent French anthropologist, a former student of Lévi-Strauss and a member of the Collège de France, gave an interview to the Catholic newspaper *La Croix* in which she famously proclaimed that “No society permits homosexual parenthood” (Gomez 1998,

no pagination, see also Butler 2002). Hérítier has noted in an article on the concept of family written for an encyclopedia of anthropology that there are certain fundamental characteristics that make a group of people a family: they live together, they share blood ties and that their form of residence is socially accepted (Hérítier 1991: 293). They resonate with the characteristics of family laid out by Lévi-Strauss (1983 [1956]) in his article *La famille*: the family originates in marriage, it includes the husband, wife and their children who are linked by juridical ties, economic, religious and other obligations and a clearly defined grid of sexual rights and prohibitions as well as a variety of emotions such as love, affection, respect, fear etc. (Lévi-Strauss 1983 [1956]: 71). Hérítier said in the interview that she did not want to deliver a value judgement on the acceptability of same-sex parenting. What she stressed was the division of parenting into its masculine and feminine components and that this is absent from same-sex parenting.

She laid most emphasis on the fundamental distinction between the sexes: to her, the anatomical, physiological and functional dichotomy is what our ability to think is based on. In her view, thinking is primarily about classification, classification is the definition of difference and the most fundamental distinction is drawn between the sexes. Hérítier has written about the distinction between the sexes extensively in her book *Masculin/Féminin: La pensée de la différence* (1996) where she has compiled texts on the anthropology of gender from a period of over a decade. In her view, the difference between the sexes is the ultimate limit of thought which is based on the difference between the same and the different and which is present in all systems of representation and scientific thought from antiquity to this day. She admitted that she had not studied the debate around the sex/gender distinction extensively, but stated that she was interested in the notion of the “social sex” as a construction affecting the division of labour between the sexes, one of Lévi-Strauss’ “three pillars” of family and society together with the prohibition of incest and a recognised union between a man and a woman. (Hérítier 1996: 20-1.)

What this debate on the symbolic order seems to boil down to is the question whether the symbolic is reducible to the social or whether it acts as a separate category of analysis. Judith Butler’s analysis of the figure of Antigone, the daughter of the main character of the Greek tragedy *Oedipus*, in *Antigone’s Claim* focuses on the limits of speech and “speakability” in the domain of kinship, or the problem of signification in the language of kinship. Butler’s commentary of Antigone makes interesting links to modern-day debates on kinship: Antigone’s own position in the incestuous web of the Oedipal tale means the way she uses kinship terms such as brother and father in ways that are far from equivocal. It is this ‘misnaming’ that contests the relation between the signifier and the signified: naming one relation with more than one name or giving the same name to more than one relation destabilises respect for the symbolic order. (Butler 2000.) Butler argues in her analysis of other commentaries of *Antigone* that Lacan makes “a certain idealized notion of

kinship into a presupposition of cultural intelligibility” (2000: 3), thus juxtaposing the symbolic and the social. According to Butler, Lacan says that the symbolic is not reducible to the social. Butler argues that the distinction does not hold, as we always refer to social norms (2000: 20-1). Paraphrasing Lévi-Strauss in *Race et histoire* (1974), Butler says that “cultures maintain an internal coherence precisely through rules that guarantee their reproduction” (2000: 74). Thus, the constitution of these rules demands analysis, but what is equally interesting is how the rules might mutate when they are put into practice in everyday life.

Pierre Zaoui, a French philosopher, has noted in his analysis of the debates surrounding the symbolic order in France that it is evoked in order to recast authority in the field of social reproduction. The fear of people using the law as a vehicle for playing out and legitimising private passions is disguised with referring to structures and principles beyond the reach of positivist and deliberative law-making. Zaoui argues that the concept of symbolic order is of a descriptive kind and that its use as a prescriptive notion demonstrates a confusion between theory and practice. According to Zaoui’s reading of Lévi-Strauss’ *Elementary Structures of Kinship* (1949) “the symbolic order in the Lévi-Straussian sense is neither a strict prescription nor, or actually less a strict prohibition: it is rather a simple structural order of symbols, *describing* only that no communication or exchange between humans can take place without following a previously fixed order” (Zaoui 2005: 232). Furthermore, he stresses that “the notion of the symbolic order is initially a strictly descriptive notion: it articulates how society functions in general, what kind of types of relations it follows, but not how society should function in detail, spelling out which terms and individuals it affects” (2005: 233). Zaoui concludes that the symbolic order is a scientific, not a practical notion. Moreover, it is a problematically scientific notion because it is not a determinate notion, and due to its indeterminate nature, the concept of the symbolic order is not useful for contesting existing moral and political orders.<sup>7</sup>

Fassin (2001: 226) points out that the specificities of “our” genealogical system, be it characterised as French or Euro-American, became conflated with supposed universal structures of sexual difference and filiation in the *Pacs* debate. The bilinearity of cognatic descent fits nicely with the cultural ideal of the institution of marriage inscribing the symbolic and structural positions for the sexes and generations. Other forms of reproduction and the exchange of life-giving substances and capacities are seen as conflicting with the order of things and the limits of understandable language use. In short, different modes of physical and social reproduction are seen as rejection of fundamental categories and a loss of stable points of reference. The concept of the symbolic order in the French *Pacs* debates is an intriguing example of a historical situation where a theoretical and descriptive concept became a normative and prescriptive one. The origins of the concept can be traced to

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<sup>7</sup> The quotes from Zaoui translated by the author.

Lévi-Straussian structural anthropology and to Lacanian psychoanalysis, but the symbolic order evoked by Théry and her critics within the *Pacs* debates referred to something much more politically and discursively tangible than the Symbolic that Lévi-Strauss referred to in *Elementary Forms of Kinship* and what Lacan picked up on. (See Fassin 2000.)

However, on the analytical level, the usefulness of the concept of the symbolic order was impaired by the fact that it collapsed sexual difference, reproduction and linguistic intelligibility all under the same term: instituting same-sex marriage or similar unions does not de-institute sexual difference throughout society, it only takes out sexual difference for abstract subjects of law capable of entering into a marriage-like contract. Likewise, the recognition of same-sex parenting does not wipe out sexual difference and the symbolic/social positions of mother, father and parent in the collective imagination of a given society, just like the ‘disobedient’ use of words such as mother and father in the plural does not irretrievably de-stabilise the shared meaning of those linguistic signs. What Robcis puts forward is that “structuralist anthropology and psychoanalysis were particularly well adapted to French political culture because they offered normative accounts of fundamental sexual and social mechanisms that seemed reassuringly compatible with the secular values of French Republicanism” (2007: ii).

A historical example of Saint-Simonian thinking that fits nicely with the Republican ideals of the complementarity of the sexes, the idea of the ‘social individual’, might help in setting the talk about “symbolic order” in context. In a historical review of French feminist thinkers from the Revolution to the Second World War, Joan Scott (1996) discusses the views of Jeanne Deroin, a 19<sup>th</sup>-century socialist feminist:

*Deroin took up the Saint-Simonian formula for equality in which “the couple, man and woman”, was the social individual without whose union “nothing is complete, moral, durable or possible”. Offered as a critique of the divisiveness of selfish individualism, this idea of the social individual stressed the complementarity of opposites, the necessary interrelatedness of qualities thought to be antithetical to one another, and the complexity of concepts presented as singular. The individual was a couple, and so Deroin’s vocabulary insisted on its duality: she referred to it as “un et une” in the singular, “tous et toutes” in the plural. Humanity was man and woman: an androgyne in some of her representations, in others the copulating couple whose union merged two into one to form a child, in still others the two aspects of God. The marriage that would regenerate the world was that of two equals, “whom God has thus joined, no man can separate”.*

*Joan Wallach Scott (1996: 74)*

Thus, along with her ideas of social and political equality, Deroin defended the idea that together, a man and a woman constituted an important unit for the reproduction of society. This idea of the “social individual” helps with coming

to grips with secular and socio-political ideas of the complementarity of the sexes as opposed to dogmatically imposed order of God-given roles to fulfil.

Derooin's ideas resonated with those of Irène Théry in the times of the *Pacs* debates. What unites these views almost two hundred years apart is the idea of gendered citizenship: not fulfilling one's prescribed social role as a man or woman in the institution of the Republican family amounts to selfishness and "communitarism", the rejection of not merely one's biological destiny but one's way of participating in social and political life. Republican civil marriage, according to Théry, was for everyone, as it unites people regardless of their religious or political leanings. However, its claimed universality comes into question in the context of same-sex unions – Republican marriage caters for everyone who is willing to fulfil their role as a male or female citizen, but not to everyone regardless of who they want to marry (prohibited relations set aside for now). What is needed is a reconceptualisation of the social individual: a family unit is built on the consensual (sexual) union of two individuals, who enter into a contract of mutual care and assistance, incorporating into this unit the minors that are under the guardianship of either of the partners. But exactly this, according to Théry, was the "desymbolising passion" (1997: 175)<sup>8</sup> of CUS, *Pacs* and any other gender-neutral legislation: it would take the colours out of the family, as it were, if it becomes an institution that does not make a distinction between the sexes within the couple forming the family.

However, by the early 2010s both Théry and Héritier had proclaimed to be in favour of same-sex marriage in the debates preceding the entering into effect of the law on same-sex marriage in France. In this piece of legislation, marriage and adoption were legalised for same-sex couples in France, but assisted reproduction was left outside this, and the question was referred to the national bioethics council. Théry was directly asked about her change of opinion in an in-depth interview (Grosjean 2012). She explained that her thinking had evolved over the years, inspired both through personal encounters and research by other social scientists on the importance of the possibility to marry to many homosexuals. In the interview, she explained that during the *Pacs* debates in the 1990s she did not quite understand why gay activists even talked about gay marriage. Citing Jean Carbonnier, a famous French lawyer and the architect of 20th-century French family law, she noted that in those days, "the heart of marriage is not the couple, it is the presumption of paternity" (interview in Grosjean 2012, no pagination)<sup>9</sup>. In 2012 she was ready to reformulate this into "the heart of marriage is no longer the presumption of paternity, it is the couple". Along with the couple as the most constitutive element of marriage, she contended that marriage was and is a historically changing and contingent institution. (Grosjean 2012.) In a collection of articles edited by Théry, published in 2013 to counter a report by

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<sup>8</sup> "...passion de désymbolisation" (1997: 175).

<sup>9</sup> "Le cœur du mariage ce n'est pas le couple, c'est la présomption de paternité." (See Grosjean 2012.)



a conglomeration of conservative NGOs regarding the proposed changes to family law, she offers a variety of arguments that illustrate her views at the time same-sex marriage in France was legalised (Théry 2013). Countering positions against same-sex marriage, adoption by same-sex couples and opening assisted reproduction to female couples, she argues her points in order to contribute to a “democratic, informed, and serene” (Théry 2013: 9) debate. According to her, “opening marriage and adoption to same-sex couples will not destroy marriage, family, difference between the sexes or civil status” (2013: 11)<sup>10</sup>.

Héritier, too, confirmed in an interview in 2013 her view on the historicity, evolving nature and contractual essence of marriage. “The social order has always been created by the human mind and has corresponded to the demands of a certain era, with the transmission of institutions over time”<sup>11</sup> (Gairin 2013). In her expert statement to the Law Commission of the Senate, the upper chamber of the French parliament in 2013, she explained her positions in more detail: she stressed the variability and manipulability of kinship categories. According to her, anthropology has come up with typologies of kinship relations from different cultures, and each of them has its own internal logic. The rules within these systems are open to change, variation and evolution, and our culture is one among many. She argued to the Law Commission that these kinship systems are creations of the human mind and that contemporary European kinship rules are characteristics of a reality among others which has evolved over time. (Commission des lois 2013.) Here we see that she evokes the ‘limits of intelligibility’ contrary to her position at the time of the *Pacs* debates (interview in 1998, previously in this chapter). Furthermore, she stresses in her presentation to the Law Commission that filiation as a concept needs to be separated from genetics and gestation<sup>12</sup> as it refers to the social rule that determines the attachment of a child to a certain group (Commission des lois 2013, see also Héritier 2009: 170-171). So, despite the deployment of the symbolic order and the difference of the sexes, the unsurpassable limits of human thinking, both the views of social scientists and legislators may and do change. One may ask what happened to the structuralist social contract along the way – has it been left to the opponents of same-sex marriage and other forms of gender-neutral family formation? Does it remain a curiously complicated historical construction, or does its value lie more in making sense of a traditional view on alliance and filiation?

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<sup>10</sup> “... l’ouverture du mariage et de l’adoption aux couples de même sexe ne détruira ni le mariage, ni la famille, ni la différence des sexes, ni l’état civil”. Translation by the author.

<sup>11</sup> “L’ordre social a toujours été créé par l’esprit humain et correspondu à des impératifs qui étaient ceux d’un moment donné, avec ensuite transmission d’institutions au long cours.”

<sup>12</sup> Referred to as “engendrement” (genetics) and “enfantement” (gestation).

### 1.3 RELATIONAL SOCIOLOGY AND FEMINIST LEGAL THEORY

*The word family indicates relationships: it is a relationship, not a place or something like a locale. All the language that we adopt to describe what we 'see' beyond single individuals is essentially relational. Words have meaning only if they refer to relations: in a sense, words are relations. All our thinking processes are relational: they connect and refer through relations, and to this extent they are served by the mediation of language, which is a great collective, symbolic and relational image.*

*Pierpaolo Donati (2011: 15-16)*

The two sub-chapters preceding this one offer a discussion first on classical concepts in the anthropology of kinship that are helpful in grouping my analysis under the main rubrics of alliance, consanguinity and filiation and in shedding light on how classical concepts and theories of this field of study in anthropology reach out to both academic and political debate today. In this sub-chapter I wish to offer a discussion on how social and legal relations are understood, on one hand, from the perspective of relational sociology, a general theory of society, and on the other hand, from the perspective of feminist political and legal theory, focusing on relations as ties between people that structure and orient our lives both on a practical and on an ethical level. My aim is to try and draw essential points from these two strands of thinking for the purposes of my analysis. In the context of this study, “relational” refers primarily towards recognising the multiple and, contingent ways humans relate to each other in the realm of family life. Thus, “relational subjects” for the purposes of this study are understood mostly in the spirit of feminist political and legal theory that Leckey calls “relational theory” (2008). According to this view, the applicants in the case law analysed in this study are embedded in webs of affective human relationships that they wish to call family relations or family life in the context of their national legal systems and the European Convention of Human Rights. Behind this, another more abstract view of “relational” emerges as stressing a certain view of viewing social, political and legal reality, where relations exist also between individuals and institutions such as ‘family’, ‘State’, ‘law’ or ‘human rights’.

This is where a relational view of society and social theory comes in useful as elaborated in the various strands of relational sociology, a general theory of society in contrast to conceptualising human societies as made up of “solid societies of social structures” (Dépelteau 2013: 166). As François Dépelteau has noted, “relational” is a term that crops up in numerous different contexts in scholarly texts within the social sciences and humanities (2013: 9). He goes on to characterise this as a “relational turn” (2013: 51). As he notes, there is not much that scholars of relational sociology agree upon apart from the fact that they call their main object of inquiry “relations”. One of the major bones

of contention is how the ontological status of relations is seen: are they seen as transactions between social actors (e.g. Dépelteau 2013; Crossley 2013; Crossley 2010; Emirbayer 1997) within a single-level ontology or are relations seen to possess an existence of their own as well as causal powers – “emergent properties”, as Archer (2013: 152) would have it. Donati and Archer (2015, see also Archer 2012 and Donati 2011) argue that relations are entities of their own with emergent properties, and see the views of Dépelteau (2008, 2013) and Emirbayer (1997), for example, as “relationists”, not grasping the emergent, causal and independent nature of social relations. The view adopted in this study tips closer to the seeing relations according to the transactional and “relationist” perspective, but the work of Donati and Archer merits to be discussed here as they have developed the notion of relational subjectivity, albeit from a different viewpoint, in their recent book *The Relational Subject* (2015). However, to them, this can be an aggregation of individuals, be it a couple or a larger group of persons. As opposed to the “transactionalists” they argue against, their multi-level ontology, the emergent properties of relations and mentions of concepts such as ‘the common good’ that resonate with Catholic Social Teaching, an important point of reference to both of them<sup>13</sup> may allow to characterise them as “transcendentalists” in the context of social ontology, too.

Together with *The Relational Subject* (Donati and Archer 2015), Pierpaolo Donati’s *Relational Sociology* (2011) may be counted among the few attempts by a in recent years to deliver a comprehensive account of what relational sociology constitutes from the viewpoint of one or two like-minded scholars. A similar, but differently based account has been given by Crossley in *Towards Relational Sociology* (2010). Donati’s *Relational Sociology*, however, happens to make direct links to his earlier and ongoing research in family sociology. To Donati, social relations, instead of ‘social facts’, structures or subjects, are the basic cells that make up human society, and provide an alternative take on the constitution of society compared to the tension between structure and agency (Donati 2011). He is also specialised in family sociology, and indeed a lot of the examples he cites in this theoretical piece are taken from micro or macro level family sociology. Judging by these examples cited from *Relational Sociology* (2011), he is not a proponent of a pluralist view of family formation at all. However, the theory of relational sociology as a general sociological theory may be read and appropriated in counterpoint (see Chapter 3.3) from a pluralist point of view, as it may be applied to shift the focus in both theoretical and empirical accounts of family life to relations between

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<sup>13</sup> Archer and Donati also operate with many concepts that, most probably due to their involvement in the Pontifical Academy of Social Sciences, bear resemblance to remnants of the language of Catholic Social Teaching in the Universal Declaration of Human Rights and international human rights documents up until this day. For publications discussing the relation of contemporary sociology and Catholic social teaching as well as for personal reflections on these themes by Archer, Donati and others see Sharkey (2012).

subjects instead of their immutable, fixed or prescribed statuses or identities. Thus, Donati's views on the significance of social relations in the constitution of society and on the symbolic and structural aspects of kinship provide food for thought for conceptualising what a theory of 'relational subjects' in family life might look like.

Donati identifies the earliest traces of relational sociology in "Georg Simmel's 'relational turning-point'" (2011: 6) and in Marcel Mauss' theory of gift exchange (2011: 6). He does not see Durkheimian social facts as the main object of sociological inquiry, but social relations: "the object of sociology is neither the so-called 'subject', nor the social system, nor equivalent couplets (structure and agency, life-worlds and social system, and so forth), but is the *social relation itself*" (2011: 4-5)<sup>14</sup>. Furthermore, Donati draws a lot from some of the main notions of the 'structuralist social contract' (Robcis 2013) even though he does not call it by that name. Especially in discussing the examples of relational sociology that he takes from the field of family sociology, he argues in favour of understanding family relations as pertaining to a field of 'symbolic' (linguistic) significations and structural distinctions. According to him:

*Durkheim developed a strongly integrative (and radically holistic) theory of social relations, which underlies their symbolic character (as 'collective conscience') and structural character (as ties) produced by society. From him emanated the French school (including Mauss and Lévi-Strauss) who conceive of social relations as essential cognitive structures of society, understood as a collective order of exchange through which is generated and regenerated the passage from nature to culture.*

Pierpaolo Donati (2011: 78)

Thus, to Donati, the semantics of social relations are referential (symbolic) and structural (tie/link). True to his engagement with critical realism, he continuously tries to find a mid-way between Durkheimian views of society as an organic whole and what he calls 'relationist' or postmodern views of the society as made up of individuals. According to Donati:

*Relational sociology sides neither with individualism nor with holism. In fact, it opposes both the under-socialized vision and the over-socialized vision of the human being. It affirms the existence of an order of reality that sociology, whether classical or modern, still has not understood. Society is neither an organic body nor a sum of individuals. It is, instead, a relational configuration which goes beyond the simple sum of individuals but never goes so far as to become a holistic body.*

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<sup>14</sup> Emphasis original.

To Donati, a pluralist view of family would most probably be guilty of both what he deplores as postmodernism (nihilism?) and 'relationism', which he sees as promoting a postmodern and individualist mode of thought where relations emerge from the subjects or terms that they link: "...[R]elationists see the relation as the merging of the terms it links. In this way, we meet a relativist and pragmatist vision which views the relation as a form of determinism in its own right!" (2011: 66). This resonates with the Legendrian idea of "autonomously founded subjects" as analysed by Théry in the Introduction.

However, what Donati does not take up is that his general views on the significance of relations and relational configurations as the basis of social life and society do not need to be applied to call for the singularist view of 'the family' he takes up in his examples. A relational (or what he probably would call relationist) view of society might just as well draw attention to the significance of social relations regardless of the gender and many characteristics of the subjects concerned. After all, critical realism, and, as a continuation of the critical realist tradition, relational sociology does give significance to social change and the agency of individual subjects. Indeed, according to Donati, social change as described according to the relational paradigm takes place in the following manner: the context of subjects produces the dynamics of relations and social interactions, which lead to emerging social forms.<sup>15</sup> When articulating what family is, Donati builds on a structuralist-symbolic foundation: "... [T]he relationship that we call a family is not only a product of perceptions, sentiments and empathy, but is a fact which is both symbolic ('a reference to', i.e. *re-fero*) and structural ('a bond between', i.e. *re-ligo*). As such, it does not depend on the subject even though it can be actualized ('live') only through subjects" (2011: 16). In more everyday terms, he deplores the view he argues postmodern 'relationists' have of family relations: "The family is figured as a construct, according to choice, and with this it loses the characteristics of a deep inter-subjective relation based on the encounter of a man and a woman and on reciprocal exchanges between generations. Family and work become human only under certain conditions and specific moments" (2011: 21). It seems that according to Donati, the dichotomy of masculine/feminine provides a great deal of these conditions and moments when it comes to viewing certain sets of relations as constituting family life.

Throughout *Relational Sociology*, Donati takes up ethical considerations and examples where he often deplores what is happening in the world today. Many of these examples concern family formation or family life, but some of them are related to social relations in the field of work or in the era of digital and mass communication. Furthermore, he dresses these comments on many

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<sup>15</sup> See Figure 5.4 in Donati (2011: 178).

occasions in the rhetoric of Catholic social thought, stressing the significance of what is 'human', deploring the 'de-humanising' aspects of contemporary social life and stressing the significance of the 'common good'. So, according to Donati, a relation between two adults is not enough to make a couple or a family – he very much refers to the structural (man/woman) and symbolic (linguistic) aspects and the gender/generation grid. But what if a group of people look like a family and function in every possible way as a family, but is based on a dyadic same-sex relationship? In fact, sociology would indeed be quite blind as a discipline and as a way of thinking to what is going on in society if it blatantly refused to see, acknowledge and analyse new forms and configurations of social and family life that emerge around it.

*It is only possible to get away from the current disarray in sociology about what the family 'is', by grasping the autonomous reality of this relation on its own terms. But what does the 'relational reality' of the family consist of? ...we see individuals but we speak on the supposition of relations. The word family indicates relations. All the language that we adopt to describe what we see beyond single individuals is essentially that of relations. The words make sense only if they refer back to relations.*

Pierpaolo Donati (2011: 129)

If read and replied to in counterpoint, the quote above captures the idea of a pluralist view of family life: by describing certain relations as family life (such as same-sex adult relations or non-genetic parent-child ties in families formed by same-sex couples), actors also create relations in time and space. These aspirations may then be taken to the public sphere and be formed into political and legal claims such as complaints to national courts and the European Court of Human Rights. Furthermore, Donati argues about family and social change:

*The point is that to grasp social change in the family, it is necessary to regard it as a social relation and to maintain the connections between the family as an inter-subjective relation... and as an institutional relation... For this, it is necessary that the observer adopts a point of view on the basis of which the family cannot be reduced to a summation of individual life courses or to a contingent interlocking of them.*

Pierpaolo Donati (2011: 187-8)

But what if “summation of individual life courses” and “contingent interlocking of them” constitute family relations to a great number of actors? My argument is that Donati's ideas of relational sociology in general and most of his ideas of relational family sociology are very much applicable to the pluralist view of the family, even though he argues the opposite in family-related issues. Also, many of the ethical aspects he is after, namely social

cohesion, reciprocity and common good may be very much advanced by adopting a wider notion of what may constitute a family.

Nicola Lacey, a British legal theorist, has introduced the notion of “relational subjects” (1996: 150, see second opening quote in the Introduction) somewhat inadvertently in an article of hers in which she discussed ethical orientation of legal theory from a feminist perspective. She builds her analysis of equality, rights and subjectivity on critical legal theory and feminist concerns. According to her, equality and rights “are in pluralist discourse salient markers, supposed guarantees, of universal citizenship and legal subjecthood” (1996: 147). Both the concepts of equality and rights have been subject to feminist critique, which, together with critical race theory and Marxist perspectives

*...has traced the ways in which rights presuppose a particular view of the subject and of that subject's place in the world. The rights bearer is an individual who is defined in terms of certain powers and capacities: in a sense this subject is alienated even from himself, in that he stands in a relationship of ownership to his defining characteristics. Furthermore, his relation to the world and to other subjects is, when mediated in terms of rights, essentially that of subject to object: the having of rights is the having form of property, for which one competes with others, which one asserts or defends competitively as against others, and which are enforced coercively against others.*

Nicola Lacey (1996: 147)

Lacey goes on to ask how rights could be seen differently in order to avoid this orientation of competitive individualism. She argues that it is possible to reimagine rights from the viewpoint of critical and feminist scholarship. Here, she takes up the thinking of Luce Irigaray, a French philosopher and psychoanalytical theorist. According to Lacey, Irigaray argues that “a relational conception of rights would have to be premised on the recognition of irreducibly different subjectivities which relate in an intransitive way to another” (1996: 147). However, as Lacey points out, Irigaray’s thinking (1996, see also Lacey 1995) is difficult to translate into the language of formal rights and the law, as an ethics of sexual difference might, if viewed in a simplistic and stereotypical manner, produce problematic and disastrous effects from the point of view of gender equality (1996: 149).

Robert Leckey, a Canadian legal scholar, has combined liberal feminist theory to the study of family law and administrative law in his book *Contextual Subjects* (2008). The main argument Leckey puts forth is that family law and administrative law, the fields his analysis focuses on, have begun to perceive contextual subjects (subject = legal person) as the main characters of these fields, as well these areas of law also becoming contextual subjects (subject = area of study) themselves. Leckey offers a very intriguing and useful approach to the study of family law and administrative law with his combination of legal

contextualism and feminist relational theory: he argues for “the emergence of a new conception of the legal subject using relational theory” (2008: 7). In the context of Leckey’s study (2008: 7), “relational theory” is a strand of political philosophy and feminist political theory, informed by an ethics of care in the spirit of the work of Carol Gilligan (1982) and Eva Feder Kittay (1999), for example. According to Leckey

*Relational theory is not an officially constituted school, and its boundaries are contestable. It can be seen as comprising several connected and overlapping areas of work. One proposes and elaborates an ethic of care. Such scholarship draws attention to the crucial relations of dependence and care on which each individual inevitably relies at some point.*

*Robert Leckey (2008: 7)*

Leckey goes on to describe that relational theory tends to emphasise differences between men and women in their orientation to care, be it on a level of principle (‘ethics of care’ v. ‘ethics of justice’) or practice and everyday life, where women perform most care duties in society (2008: 7). Leckey complements this strand of thinking with literature on rights as relational, where rights are “cast... as tools revisable in the service of desirable relationships” (2008: 7). This line of legal thinking has most extensively been dealt with in *Law’s Relations* by Jennifer Nedelsky (2011), a scholar on relational autonomy, a field of study which strives to reconfigure liberal ideals of autonomy. Envisioning subjects as relational is not emancipatory or liberating as such: a (married) woman stripped of legal capacity, a construction of Western political and legal thinking from less than 100 years back depending on the State in question was a person utterly enmeshed in relations where the needs or status of others such as her husband or her children defined what she was. What thinking on relational autonomy tries to capture is how to combine what is good in abstract (legal) individualism and subjectivity while at the same time taking into account the importance of relations of care and ethical responsibilities towards other persons. (Nedelsky 2011; see also Choudry and Herring 122-127.)

What I wish to draw from Leckey’s work is primarily his concept of ‘contextual subjects’ as a conception of the legal subject that has been constituted with an emphasis on relations between subjects and the particular circumstances they inhabit. Even though Leckey is writing about the Canadian legal context, his characterisation of the third quarter of the 20th century is apt: he argues that

*...relational theory illuminates family law during the period 1950-1975. Family law, at that time, produced a thick legal subject, one embedded – to an extent asphyxiating for some – in social relations and religious traditions. In contrast to relational theory’s exhortations, family law showed itself to be markedly acontextual in*



*methodology. A couple of statuses structured the field dichotomously: married/unmarried and legitimate/illegitimate. For the most part, lacking the privileged status entailed an unpleasant packet of negative consequences without contextual examination as to whether particular circumstances warranted other treatment.*

*Robert Leckey (2008: 248)*

Leckey, too, discusses the possibility of naming his view of legal subjectivity “relational subjects”, but in his study, contextualism is such an overriding theme that it emerges as the most pertinent field of analysis. He sees that the notion of contextual subjects is more helpful in his analysis especially in the field of administrative law, where he says a view of subjects as “relational” tips the scales in advance towards mutuality, reciprocity, cooperation and communication, or what he calls “relational theory’s normative commitment” (2008: 255-256). He argues that “two conceptions of a relational approach are intelligible: one strong, one weak” (2008: 256). The strong conception aims at emancipating individuals, such as women who have been in asymmetrical relationships such as traditional marriage arrangements, and enhancing their autonomy. The weak conception does not share the strong normative commitment of the strong one, but aims at developing normative thought and applying a relational approach to contexts where it has not been developed before. Most importantly, it “seeks to assess situations through its lens of the descriptive premise of subjects as embedded and to identify and analyse the way that existing rights structure existing relationships” (2008: 256). This study strives to carry out an exercise according to the latter approach, probably falling back to the first one at times.

## **1.4 DISCUSSION: WEBS OF ALLIANCE AND FILIATION**

*... self-ownership requires a conceptual division between the self as a subject and the self as a physical object. Since women are under-represented as active agents in language, law, political discourse, and the symbolic order generally, ‘self-ownership for women appears irregular.*

*Davies and Naffine (2001: 41)*

ECHR case law constitutes a vast sea of knowledge that comes with significant legal and political authority in the Member States of the Council of Europe. The concepts discussed in the first sub-chapter, alliance, consanguinity and filiation, offer anthropological themes under which case law may be grouped and analysed. In contemporary circumstances, ‘alliance’ translates as the act of forming couples and usually living together, possibly getting married or forming a civil union on the way. Consanguinity, or the metaphor of ‘shared blood’ refers to genetic and gestational ties but perhaps instead of slicing it up

to genetic and gestational relations, the notion of biological relations might convey the ensemble of the whole process of conceiving a child, pregnancy and childbirth in which not just pregnant women but their intimate partners are party to on the level of everyday life. Relations of filiation are often registered and instituted on the basis of consanguinity, but if we wish to look at what filiation ultimately rests on, it is not shared genetic substance as such but the predetermined form of recognising certain interpersonal relations as valid in relation to the community and State question. Adoption and assisted reproduction provide contexts where relations of filiation are constituted on a more technical level, both legally and biotechnologically.

Debates surrounding the notion of a 'symbolic order' of kinship acting as a barrier to legislative changes such as instituting civil unions and marriage for same-sex couples and recognising children born from non-coital forms of reproduction associated with these unions have been played out mainly in France and the French-speaking academic sphere, so they have a certain limited and localised colour to them. However, the link made and the continuum provided by classical anthropological thought and psychoanalytical approaches to modern-day debates concerning what family 'is' and may be made up of on the level of persons, sexes, genders and orientations is particularly interesting and provides a mirror to the less 'intellectualised' debates in the English-speaking academic world where the notion of a 'symbolic order' has rarely been mentioned. Lévi-Straussian (and Lacanian) thinking and its latter applications to these debates over the decades has been criticised by feminist commentators on both sides of the Atlantic for universalist and patriarchal views on the incest taboo and for conceptualising the exchange of women as the threshold of culture. However, as Camille Robcis (2004) points out, 'founding fathers' of this particular discourse such as Lévi-Strauss were probably not motivated by great political passions when theorising on this issue and it can be argued that the foundations of this debate provided by this line of thought need not be interpreted as providing normative answers.

Taking stock of the thought of Lévi-Strauss is useful for understanding the theoretical context and the wider meaning of the concept of the 'symbolic order' of kinship, referred to in the *Pacs* and '*mariage pour tous*'<sup>16</sup> debates, but it is better seen as a product of its time instead of a normative account of what might be the universal 'anthropological' characteristics of human families. Certain parallels may be drawn between the French political and legislative arena and a European culture of human rights: in both contexts of discourse and debate, presenting rights-related arguments that refer to divine authority, religious tradition or 'nature' would not be seen as convincing, rather very subjective. Scientific, or theoretical arguments, in turn, are evoked in these contexts, but they too come under a variety of guises: statistical

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<sup>16</sup> "Marriage for all", the slogan of the campaign for same-sex marriage in France in the early 2010s. See Robcis (2015).

information or outcomes of empirical research, or in the French variety, in a mixture of philosophy, social theory and a certain secular dogma of legal tradition, or a Legendrian ‘anthropological function of law’ to act as the source of reason (see Supiot 2008) in an uncertain and irrational world. A certain quasi-universalism and an illusion of inclusion seems to be a basic tenet in both spheres of political and legal activity. Universalism entails the promise of formal equality, but tends to be blind to the particular, be it gendered individuals, sexual orientation, gender identity or historically moulded social contexts, such as the emergence of non-heterosexual family formation due to the decriminalisation of homosexuality and the popularisation of human rights rhetoric in civil society activism.

In sum, it can be said that both as a political philosophy and a set of legal principles, human rights have moved away from dogmatic doctrine and the conception of such principles as ‘given’. Instead, human rights reside in an intersection of the three latter categories drawn by Dembour (2010): deliberated, fought for and talked about. In addition, claims for recognition of family formation that forego demands of status (married or unmarried) and gender (male and female) that external views proscribe is an application of the principle of equality built into human rights thinking. The framework of analysis that is applied in the three subsequent chapters of this study places biological, social, legal and gendered relations in the webs of alliance (marriage and *démariage*), consanguinity (maternity and paternity) and filiation (adoption and assisted reproduction as paths to maternity, paternity and parenthood in general). From the point of view of feminist relational theory this leads to conceiving family relations being relations bestowed upon particular, legal and abstract subjects whose “irreducible differences” (Lacey 1996: 150) are taken into account. This intersection of various forms of family relations between individuals with forms of kinship produces *relational subjects* in the field of family law.

It is argued in this study that the notion of ‘relational subjects’ acts as a nodal idea of trying to make sense of what the collision of human rights thinking and family law in this particular historical juncture is producing. In this schema, structure refers to the existing status of subjects, be it male, female, married or unmarried, for example. In these structures, which somewhat vary between different States and relevant legislation, kinship and family are understood as systems or institutions where subjects may inhabit certain symbolic positions of wife, husband, mother, father, daughter, son, sister and brother according to their gender and/or marital status. In the context of defending a traditional view of family, structure and symbolic positions are usually defended as natural, immutable and perhaps transcendental. Agency, then, may be of individual kind on the micro-level of everyday life or of a politicised kind and channelled through political activism, advocacy and/or academic debate, which is often inspired by identity politics, namely feminist and LGBT (lesbian, gay, bisexual and transgender) perspectives. In the context of a pluralist view of family, various reforms of

family law and policy are advocated for in order to make e.g. marriage or recognition of parent-child relations more flexible and less bound in gender or presumed heterosexuality. The dichotomies of structure and agency, status and identities or traditional and pluralist views of family may be broadened with a relational analysis of family formation in contemporary Europe, which may take the significance of relations between individuals as its starting point. A gender-sensitive relational analysis may also escape the pitfall of formal gender-neutrality turning into gender-blindness. After all, as may be learned from the 'structuralist social contract' (Robcis 2013), gender is an inescapable category and distinction both on physical and social levels and built into human society as one of the main relations structuring social life *par excellence*.

## 2 CONCEPT OF FAMILY IN INTERNATIONAL HUMAN RIGHTS LAW

*For both sides of the debate, at issue is not only the question of which relations of desire ought to be legitimated by the state, but of who may desire the state, who may desire the state's desire.*

*Judith Butler (2002: 22)*

How does the concept of family relate to thinking about human rights? What is written in international human rights documents and treaties concerning family and marriage? What kind of implications does this have for the protection of vulnerable categories of people such as women, children and minorities? In short, to what kind of a family do human beings have a 'right' in the realm of human rights law? These are some of the questions that need to be addressed before embarking upon an analysis of how family relations have been defined and conceived in the case law of the European Court of Human Rights. At first sight, one might wonder whether family relations have anything to do with human rights at all. Human rights may be understood in a fairly narrow, politically liberal way pertaining to individual civil and political rights and the protection of individual liberties in the public sphere. The Universal Declaration of Human Rights from 1948, a resolution adopted by the General Assembly of the United Nations is the founding document of a "culture of human rights" (Hastrup 2001, 2003) emerging after the Second World War. Its content has acted as an inspiration for international human rights treaties within the United Nations and regional human rights systems such as the Council of Europe. The Universal Declaration contains a "definition" of family and a confirmation of the right to marry in one of its Articles (Article 16), and some of the other Articles in it provide support for mainly economic and social rights concerning family life.

The UDHR is widely read, commented on and circulated also today even though almost seventy years have passed since it was adopted by the General Assembly of the United Nations on 10th December 1948 (the International Day of Human Rights). However, from the point of view of international law its status is somewhat ambivalent: legally it is a mere declaration and thus not officially binding on the States that adopted it. On the other hand, it is often argued to represent customary international law and thus to act as an influential document of legal authority (see e.g. Adolphe 2006: 370). Together with the International Covenant on Civil and Political Rights (ICCPR, adopted in 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966), it forms the International Bill of Human Rights, which is the core of global human rights law within the United Nations. From these documents, the ICCPR and the ICESCR are binding in international law, as most States in the world have ratified them, making them

part of their international obligations. Later on, the United Nations has come up with specific international treaties on the rights of vulnerable categories of people, such as women (Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW, adopted in 1979) and children (Convention of the Rights of the Child, CRC, adopted in 1989).

In this chapter I wish to find out where the formulations of the Universal Declaration of Human Rights concerning family as the “natural and fundamental” unit of society emanate from. According to these sources, to what extent is family a public form of organising household relations and to what extent is it protected by privacy, both as an institution and as an entity of social life tying people together in a web of close personal relations? Is it an institution that exists to protect intimate and affective relations within the private sphere, or an institution that exists to make people act and desire in the way the State wishes them to do?<sup>1</sup> In this chapter, I will give a brief look into the drafting history of Article 16 of the Universal Declaration of Human Rights and especially the “natural and fundamental” (see Article 16(3) UDHR) character of family as a concept and institution, comparing it to documents and sources that display similar phraseology. The history of political and philosophical thought on the pre-political and pre-legal essence of human pairing and reproduction goes of course much further in history. The main aim in this chapter is to find out where the wording of the definition of family in the Universal Declaration has come from, as it is so widely disseminated, quoted, marvelled upon and argued with also today in academic research, popularised human rights education and advocacy. I argue that this is often done by taking these words at commonsensical value, detached from the ensemble of its original context, language and the philosophical and doctrinal tones it conveys. Indeed, Article 16 of the UDHR and many other human rights documents and treaties are used to argue both for and against changes in how family is understood today, showing that they are words that are hoped to “make things happen” according to the “discourse” school of human rights (see Dembour 2006, 2010).

## **2.1 FAMILY IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

In the Universal Declaration of Human Rights, it is proclaimed in Article 16(3) that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State”<sup>2</sup>. Variations of this proclamation or other phrases concerning family as a concept appear in many human rights conventions on both the global level and within regional

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<sup>1</sup> See opening quote by Butler (2002).

<sup>2</sup> Universal Declaration of Human Rights, Resolution 217 A (III) of 10 December 1948, General Assembly of the United Nations. See Treaties and Related Documents in Sources.

systems, and these provisions are quoted widely when discussing the relationship between international human rights norms and family law in national legal systems. In this chapter I offer a rather detailed exegesis of Article 16(3) of the UDHR because this particular phrase seems to offer if not a definitive key, at least an interesting historical keyhole through which to obtain a view into the building blocks of discourses on family and human rights in the era after the Second World War. The drafting process of the UDHR and the outcome, the Declaration itself, are often hailed as a multilateral success story, where representatives of various philosophical, religious and political traditions came together and managed to come up with a document that has stood the test of time as the cornerstone of international human rights legislation (Glendon 2001). However, already during the time when the UDHR was being drafted, the whole idea of a universally applicable declaration of human rights was subject to critique by the American Anthropological Association (1947). The statement focused on cautioning the drafters of positioning one culture as more valuable than another, and was driven by anti-colonialist concerns. (See also Morsink 1999: ix, and Engle 2001).

Article 16 of the UDHR articulates the ‘right to marry and to found a family’:

*(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

*(2) Marriage shall be entered into only with the free and full consent of the intending spouses.*

*(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

*Universal Declaration of Human Rights, Article 16*

Firstly this provision protects the civil right to marry the person of one’s choice (of the opposite sex) free from coercion and interference by the State as to the combination of one’s and one’s partner’s ethnic or religious identity, for instance. The equality of husbands and wives, which was not a legal let alone a social reality in the late 1940s in many European States or other parts of the world, is an important claim in this provision. The Article does not explicitly leave out the possibility of other kinds of unions or say anything about the supremacy of marriage as a way of organising relations of affection and dependency, but as Rhoda Howard-Hassmann points out, it would be “sociologically anachronistic to assume that the drafters... of the UDHR did not have in mind a heterosexual family” in the late 1940s (Howard-Hassman 2001: 74). One could add that the Declaration does not touch upon differences of legal status between children born to unmarried parents and married

parents which would have been a more temporally close concern in the mid-20th century.

The first section stresses the equality of the spouses, but even more than that it emphasises the prohibition of any interference as to who one can marry in light of the marriage partner's ethnicity, nationality or religion. In the post-Holocaust world after the Second World War it was of utmost importance to stress that the marriage prohibitions between Jews and non-Jews that were in place in Nazi Germany (see Burleigh and Wiperman 1991) were never to be repeated. However, the absence of this kind of interference was a distant goal just like the equality of women and men in marriage: in several states in the United States so-called 'miscegenation' laws prohibiting marriage between persons of different skin colour were still in place. Such laws were repealed on the federal level only in 1967 with the Supreme Court decision *Loving v. Virginia*<sup>3</sup>. These laws were ruled unconstitutional by the United States Supreme Court in 1967, but the last acts were repealed as late as 2000<sup>4</sup>. Thus, it took almost twenty years for the promise of the Universal Declaration to be given formal power in the United States, which, after all, had been convening and leading the drafting process of the UDHR. Today, there is wide-ranging debate on whether lifting the bans on interracial marriage would be analogous to allowing same-sex marriage. (Novkov 2008.)

A parallel to the definition of family in the UDHR may be taken from a prime example of Catholic statecraft, the Constitution of the Republic of Ireland from 1937. This particular Article of the Constitution of Ireland, still in force today, reads:

*The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*<sup>5</sup>

*Constitution of the Republic of Ireland, Article 41*

According to the Constitution of the Republic of Ireland, family is "the natural primary and fundamental unit group of society" and according to the UDHR it is the "natural and fundamental group unit of society". Only two words are in different places, and the substantial content is the same.

Stéphanie Lagoutte and Ágúst Thór Árnason (1999), a legal scholar and a legal philosopher, offer a fairly balanced but somewhat simplistic analysis of the definition of family in Article 16 of the UDHR:

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<sup>3</sup> The Supreme Court of the United States judgments *McLaughlin v. Florida* (1964) repealed a ban on cohabitation between blacks and whites, and *Loving v. Virginia* (1967) the ban on interracial marriage.

<sup>4</sup> Alabama was the last State to repeal its ban on interracial marriage (Gevrek 2014: 57).

<sup>5</sup> See Constitution of the Republic of Ireland under Sources.



*In addition to declaring that the family is the fundamental group unit of society, article 16 also proclaims its "natural", essential quality; a family finds its roots in nature and biology: sexuality, procreation, birth, aging, death. Defining the family as a "natural" unit also refers to natural law: the family as an essential and natural part of a society made up by human beings. This definition of family is a direct translation of the anthropological theorization of kinship: it emphasizes the structural aspects of family, no matter when or where it is being studied. The definition synthesizes the biological and sociological dimensions of family.*

*Lagoutte and Árnason (1999: 338)*

Lagoutte and Árnason rightly point out the rooting of Article 16 and the UDHR in general in natural law. The problem with the definition of family in Article 16(3) in today, as the UDHR is so widely circulated and disseminated in various rather secular contexts, is that the word “natural” in the context of family and human rights thinking is often taken in too simplistic a manner, reducing it to a view of biology and the scientific facts of human reproduction lifting a certain mode of social organisation, a heterosexual nuclear family, as superior to others. After all, human rights thinking is all about transcending nature and biology, also when it comes to the protection of family and seeking justice, which has nothing to do with the life of humans or any other animals from the perspective of evolutionary theory, for example. Furthermore, Lagoutte and Árnason make a rather bold assertion by saying that Article 16(3) would be “a direct translation of the anthropological theorization of kinship” (1999: 338), as they offer no clue to what kind of anthropological research this theorisation refers to. One is only left to assume that they refer to the vast scholarship of social and cultural anthropology accumulated during the past century or so. After all, the term “anthropological” means rather different things when comparing ethnographic studies, medical anthropology or dogmatic anthropology, which comes closer to theology.

In his detailed history of the drafting of the Universal Declaration, Johannes Morsink, an American historian, devotes a short passage to the drafting process of Article 16 of the UDHR. It is noted that Charles Malik, a Lebanese Christian statesman and philosopher, was deeply involved in the drafting of this particular passage of the Declaration. (Morsink 1999: 252-257.) Malik was a scholar of Neo-Thomist philosophy (Morsink 1999: 30), a branch of philosophy inspired by the thought of Saint Thomas of Aquinas from the 13th century, which has become the ‘official philosophy’ of the Catholic Church. As is demonstrated in the following comparison and analysis of the definition of family in the Constitution of Ireland and the Universal Declaration, dating from the same period and taking their language from the same sources (Catholic social thinking, formulated in papal encyclicals), the word ‘natural’ should in the context of the UDHR be understood to refer more narrowly to the vocabulary of Neo-Thomist thinking and natural law.

Natural law, as a field of juridical thought, relies on the work of a long line of philosophers from St Thomas Aquinas in the 13th century to Enlightenment thinkers in the 18th century such as John Locke, Jean-Jacques Rousseau and Baron Montesquieu, for example. It may be defined in the field of philosophy as “a system of right or justice held to be common to all humans and derived from nature rather than from the rules of society, or positive law” (Encyclopedia Britannica 2014, no pagination). Many natural law thinkers relied on Christian doctrine and tried to articulate to what extent principles of natural law could be revealed through human reasoning in relation to divine revelation. What is at stake and what was most essential in the work of natural law thinkers over centuries was how humans may apply logic and find principles of justice with the help of thinking and reasoning. (Encyclopedia Britannica 2014.) In the context of the relation of human procreation, the raising and socialisation of offspring and social organisation, “natural” family still refers more to how humans make sense of natural facts and “human nature” and derive principles of justice from facts and their own thought.

Like virtually all human rights documents, the Universal Declaration holds an anti-discrimination clause in Article 2, spelling out that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The list is not exhaustive, so sexual orientation is most often argued to be covered by ‘sex’, or that failing, by ‘other status’. This is where the ‘promise of human rights’ and the dynamic and evolutive possibilities of political mobilisation with the help of human rights rhetoric and principles of international law may be located. As the principle of equality is evaluated from different viewpoints in different times and epistemic contexts, “new” groups such as sexual and gender minorities may take up the language of human rights in their struggles, be it relating to recognition of informal family relations or not. The Universal Declaration contains other Articles as well that deal with the protection of family relations, albeit not so directly. Article 25 expresses an entitlement to certain economic and social rights:

*(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

*(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*

*Universal Declaration of Human Rights, Article 25*

The second paragraph of Article 25 is especially important, as it sets children born out of wedlock on a level plane with children born in legally sanctioned marriage when it comes to social protection, something that still took decades to become an established fact in the majority of European legal cultures. However, the passage does not address differences in legal status, which have had immense importance for the transmission of wealth and property. In the case law of the European Court of Human Rights, children born to unmarried mothers were set on a par with children born in wedlock in 1979 in the judgement of *Marckx v. Belgium*. However, by this time most member States of the Council of Europe had remedied the status of children born out of wedlock, and a few states with a strong legacy of *Code Napoléon* (Napoleon's law collection from 1804, see Iacub 2004), such as Belgium, lagged behind (see Kirchner 1999).

At the time of its drafting, the UDHR was subject to critique due to the danger of the end product being a declaration written from an ethnocentrist Western viewpoint in a statement made by the executive board of the American Anthropological Association (1947), the largest association of anthropologists in the world. In 1999, the AAA produced a new "Declaration of Anthropology and Human Rights" (American Anthropological Association 1999), anchoring itself more firmly in contemporary human rights rhetoric. (See Engle 2001.) The two documents have been as opposite in intent regarding the universality of human rights, but Engle argues that "both argue for the protection of culture" (2001: 537). Over the years, the AAA has shown more professional-cum-political involvement, for example when it made a statement concerning the current debate on same-sex unions in the United States, condemning the proposed constitutional amendment consecrating marriage for heterosexual couples (American Anthropological Association 2004). This demonstrates that anthropological knowledge, just like international human rights law, may also be applied to different temporal and epistemic contexts and be argued to support political projects which represent underprivileged groups. In the times when the UDHR was created, the AAA saw it fit to try and temper colonial and imperialist tones, whereas in the early 2000s when the definition of marriage gave rise to heated debates, AAA anthropologists delivered a note on the variability of human social organisation.

## **2.2 DRAFTING HISTORY OF THE DEFINITION OF FAMILY IN UDHR**

In 1946 John Humphrey, a Canadian legal scholar, became the director of the Human Rights Division of the newly created United Nations Secretariat. In 1947 in the aftermath of the Second World War, a Commission on Human Rights was set up by the Economic and Social Council of the United Nations. The Commission appointed a committee to draft a bill of rights that could be

adopted as a resolution of the General Assembly of the United Nations. The committee appointed Charles Malik as its rapporteur. The committee decided to give Humphrey the task to conduct a survey of the world's constitutions and other rights documents and to give a first draft for the Universal Declaration. (Curle 2007.) According to Glendon (2003: 30) and Morsink (1999: 6-8) the Humphrey draft (Draft outline 1947) was based on a 400-page survey of world constitutions and rights documents (Documented outline 1947). This survey held a lot of clauses taken from Latin American constitutions (Glendon 2003) and featured several mentions of the word 'family' but it does not contain any definition as such of what 'family' would be taken to mean. Most important of all, it makes no mention of the Constitution of Ireland from 1937, which contains a definition of family which is almost *verbatim* the same as in the Universal Declaration.

The Humphrey draft itself, the Draft Outline of International Bill of Rights, makes no mention of the word family. One can only speculate whether this was because Humphrey and his assistants thought that family relations were not supposed to be the object of international human rights norms in the same way than in the end product, the adopted version of the Universal Declaration. Article 13 of the Humphrey draft does contain a mention of marriage (which resembles Article 12 of the European Convention of Human Rights, the right to marry): "Every one has the right to contract marriage in accordance with the laws of the State" (Draft Outline 1947: 6). However, from the point of view of universal or even international norms this kind of an article does not proclaim anything as such. If, for example, "the laws of the State" would not allow people belonging to different ethnic groups to marry, this kind of a clause would not be very effective in deeming this kind of legislation as unacceptable.

Morsink's historical study (1999) of the drafting process of the Universal Declaration of Human Rights based on the preparatory documents that have been preserved for later generations shows that Malik would have wanted to include even stronger indicators of Neo-Thomism in Article 16(3), but that the main division over the representatives of the States in the drafting process was perhaps rather between defining family with reference to a deity. However, the word 'natural' was disputed too, but at root, the understanding of family composed of a heterosexual union with the task of having a raising children was not disputed by the drafters. Morsink describes with the help of the *travaux préparatoires* ("preparatory works")<sup>6</sup> how Malik proposed in the second session of the Commission that Article 16 should be phrased as follows: "The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society" (quoted in Morsink 1999: 254). The only member of the Commission who was against

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<sup>6</sup> "Preparatory works" refer to drafting documents, available from relevant archives which are sometimes referred to in both in the historical and legal interpretation of the will and intention of the drafters.

Malik's definition of the family was the representative of the Soviet Union who stressed that "various forms of marriage and family existed in the world... each form corresponding to the special economic conditions of the people concerned" (Morsink 1999: 255). The representative of Belgium, in turn, proposed a two-part vote on Malik's proposition. The first part was accepted and the latter part declined (Morsink 1999: 255).

Morsink describes that Malik argued that the word "Creator" did not carry theological meaning in this case, and it could be interpreted to refer to "Nature", for instance (1999: 256). Thus, Malik managed to get his first version of the Article in the draft that was discussed in the third session of the Commission. He appealed to his fellow drafters that the phrase "the natural and fundamental group unit of society" should be included in the Declaration, because that was, in his opinion, the most important part of his suggestion (Morsink 1999: 256). France, Belgium and the United States stood behind this. The representative of Uruguay, suggested that the word 'natural' would be omitted, as "...the essential point was to state that the family was the fundamental group unit of society and that it was the cell around which a State was formed; the way in which family was constituted was of secondary importance" (quoted in Morsink 1999: 256). Morsink (1999: 284-285) notes that the word was allowed to remain as the reference to a Christian deity needed to be omitted. In any case, 'natural' in Article 16(3) of the UDHR refers strongly to natural law, not nature or biology as such.

When describing the origins of article 16 of the UDHR, Morsink presents his own, slightly anachronistic view that the proposal by Uruguay would have protected the possibility of non-heterosexuals to found a family. It is hard to believe that the representative of Uruguay or anyone else would have had this in mind in 1948 concerning non-heterosexual sexuality and family formation, as in those times, outlived homosexuality and family life were not really conceived to have anything to do with each other. Nevertheless, Morsink writes that

*...[t]he Uruguay proposal would have protected the right to found a family on the part of those whose sexual inclination is not heterosexual and still have done justice to the anthropological data which tell us that over the long haul the monogamous, heterosexual marriage is the best device a society's continued existence.*

*Morsink (1999: 256)*

It remains unclear what Morsink really means by 'anthropological' here: differences between cultures, cultural diversity or the quest for universal traits of humanity within the discipline of anthropology? In this passage, Morsink refers to a classical text by Lévi-Strauss, his essay called the "The Family" (*La famille*), but seems to have strayed from Lévi-Strauss original focus, as in this

essay, Lévi-Strauss does not present ‘anthropological data’ or analysis that would somehow champion monogamy or heterosexuality (Lévi-Strauss 1971)<sup>7</sup>.

In the essay, Lévi-Strauss sets out to answer the question “What is a family?” He stresses that “the family should not be approached in a dogmatic way” (1971: 338) and that “this is one of the more elusive questions in the whole field of social organisation” (1971: 338). He states that “monogamic [sic], conjugal family is fairly frequent...” but that “...the high frequency of the conjugal type of grouping does not derive from a universal necessity” (1971: 338). He goes on to ponder: “It is at least conceivable that a perfectly stable and durable society could exist without it. Hence the difficult problem: if there is no natural law making the family universal, how can we explain why it is found practically everywhere?” (1971: 338). In trying to answer this question, he identifies three characteristics: that family originates in marriage, consists of a husband, wife and children born in this union, and that members of a family are linked to each other by legal, economic, religious and other kinds of rights and obligations as well as by sexual rights and prohibitions and psychological feelings (1971: 339). Most of the essay is devoted to going through ethnographic data available from various parts of the world, but as always, Lévi-Strauss refrains from delivering value judgements and directs his attention on structures: for example, to him it is more interesting that the division of labour between the sexes exists in all societies, not so much how it is divided (1971).

Daniel Cere, an American scholar of religious studies, has also offered a detailed look into the history of the drafting of the definition of family in the Universal Declaration of Human Rights. He credits the Neo-Thomist content to a memorandum prepared by the International Federation of Christian Trade Unions (IFCTU) and given to Malik for the drafting process. (Cere 2009). The memorandum by J.P.S. Serrarens, General Secretary of the IFCTU, draws clearly from Catholic social teaching and papal encyclicals, and phrased the definition of family in a manner very similar to the one that ended up in the UDHR:

*The free development of the human personality implies that man has a right to marry and to raise a family. The family is the natural, primary and fundamental unit of society; it is older than society itself and has unalienable rights antecedent and superior to positive law. The family must therefore be protected by society and have its free development and its security of life ensured.*

*J.P.S. Serrarens (1947: 4)*

This all offers some explanation how the drafting of Article 16(3) of the UDHR was influenced by different actors such as Malik himself and Serrarens. How about the Constitution of Ireland? In an article on the origins of the definition

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<sup>7</sup> Lévi-Strauss (1971) is the English translation of Lévi-Strauss (1956).

of family in the Irish Constitution, Finola Kennedy (1998) argues in favour of attributing the content of Article 41, the definition of family as the “natural primary and fundamental unit group of Society” to Edward SJ. Cahill, a Jesuit priest and academic and his book *Framework of a Christian State* (1932).

In this article, Kennedy (1998) offers a discussion on different accounts of who actually influenced Éamon de Valera, an Irish politician in the early 20<sup>th</sup> century and a key architect of the Constitution on the whole (see Ó Tuama 2011). What is essential in Kennedy’s article is the confirmation that the substance of Article 41 can be identified in specific papal encyclicals of the late 19<sup>th</sup> and early 20<sup>th</sup> century, namely *Rerum Novarum* (1891), *Casti Connubii* (1930) and *Quadragesimo Anno* (1931), which celebrated the 40<sup>th</sup> anniversary of *Rerum Novarum*. In the context of Irish constitutional history, Kennedy argues that

... [Cahill’s] writings derived from the Encyclicals, which, without a shadow of doubt, are reflected in Article 41 of the Constitution. Cahill states that while the individual is “the fundamental element in all civil society”, “the natural and primary unit in the State is not the individual, but the family”. Cahill quotes from Pope Leo XIII’s Encyclical, *Rerum Novarum*: The family is a society limited indeed in numbers, but no less a true society, anterior to every kind of State or nation, invested with rights and duties of its own, totally independent of the civil community.

Finola Kennedy (1998: 362, note 11)

According to a different translation given to the global public by the Vatican today (*Rerum Novarum* 1891), the same passage of *Rerum Novarum* cited above goes as follows:

No human law can abolish the natural and original right of marriage, nor in any way limit the chief and principal purpose of marriage ordained by God’s authority from the beginning: “Increase and multiply.”... Hence we have the family, the “society” of a man’s house - a society very small, one must admit, but none the less a true society, and one older than any State. Consequently, it has rights and duties peculiar to itself which are quite independent of the State.

*Rerum Novarum*, para 12

In the following paragraph that deals with the naturalness of private property as a prerequisite for a father to support his wife and children, it is articulated that “[a] family, no less than a State, is, as We have said, a true society, governed by an authority peculiar to itself, that is to say, by the authority of the father” (*Rerum Novarum*, para 13). Further on in the encyclical, it is said that mothers should not be forced by economic necessity to take up employment outside the home. In *Rerum Novarum*, it is also said that

“[w]omen... are not suited for certain occupations; a woman is by nature fitted for home-work [sic], and it is that which is best adapted at once to preserve her modesty and to promote the good bringing up of children and the well-being of the family” (para 42) . The main content of the IFCTU Memorandum (Serrarens 1947) was clearly based on the main teachings of *Rerum Novarum*. Obviously, these passages reflect the era when they were written, the late nineteenth century, and the teaching of the Catholic Church on these issues.

The central idea in these encyclicals was how to foster a social order where the needs of the working class and the poor would be taken care of while protecting private ownership and political stability. When it comes to the view these documents had on the roles of men and women and the division of labour between husband and wife, tasks were clearly defined. Particularly important in this frame of thinking was that a sufficient family wage should be paid to the husband, who was unquestionably the head of the household. The place of wives and mothers was in the home, because that was where their primary function to be fulfilled was situated. (Kennedy 1998.) What is important and interesting in the drafting history and the sources of the wording of, for example, Article 16(3) of the UDHR is that words, especially weighty ones in adopted human rights documents, cannot be taken just at their face value and dictionary definition. “Natural” and “fundamental” take on very different meanings from their commonplace meanings when they are put together, and convey a set of philosophical, historical and doctrinal tones. When religious conservatives argue that they hold the truth to what Article 16(3) of the UDHR actually means, they are right from a certain, historical and contextualised point of view. But when these words were placed in a document like the UDHR which has such timeless and universal aspirations, they were left to stand on their own and to acquire new definitions and meanings as vehicles of political and legal change.

## **2.3 FAMILY IN HUMAN RIGHTS DOCUMENTS OF THE UNITED NATIONS**

Most human rights instruments in the United Nations system touch upon rights relating to marriage and family formation, but they tend to do so in rather commonsensical and vague terms. After finding out where the definition of family in the UDHR came from, this sub-chapter offers a look into the what legally binding international treaties the UDHR has influenced most directly. The treaties discussed here are the ICCPR (International Convention on Civil and Political Rights), ICESCR (International Convention on Economic, Social and Cultural Rights), CEDAW (Convention on the Elimination of Discrimination Against Women) and CRC (Convention on the Rights of the Child). As the rest of this chapter and the empirical analysis in this study (Chapters 4, 5 and 6) demonstrate, family is not taken to be only the family envisaged in papal encyclicals neither by bodies of the United Nations



interpreting the meaning of global human rights treaties of the United Nations such as the Human Rights Committee (the body interpreting the ICCPR) nor by the CEDAW Committee.

The 1966 United Nations International Covenant on Civil and Political Rights, a legally binding international State-level treaty with nearly universal ratification, articulates many of the rights set out in the UDHR in more specific terms. Article 23 does this with the ‘right to marry and to found a family’:

*(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

*(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.*

*(3) No marriage shall be entered into without the free and full consent of the intending spouses.*

*(4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

*ICCPR, Article 23*

Interestingly, the ICCPR places “the family” and its natural and fundamental character and its need for State protection as the first component of the Article, after which the provisions concerning marriage are spelt out. This would suggest a more foundational character being given to “the family” – as the foundation of society (all societies?) it articulates the need and the purpose for men and women of marriageable age to marry. The non-discrimination clause in article 26 is especially important, intending to protect “against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

In addition, Article 10 of the ICESCR, the International Covenant on Economic, Social and Cultural Rights states that:

*(1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.*

*(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*

*(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.*

Article 10, ICESCR

The Committee on Economic, Social and Cultural Rights mentions 'family' in several of its documents, but it has not given a further definition on what it stands for compared to General Comment 19 of the Human Rights Committee.

The task of the UN Human Rights Committee is to monitor the implementation of the ICCPR. The Human Rights Committee is an independent body made up of experts in the field of international human rights law. The HRC has actually found that the mention of 'sex' as a basis for discrimination also covers sexual orientation. This emanates from the complaint of *Toonen v. Australia* from 1992<sup>8</sup> to the Committee where the Committee deemed the existence of anti-sodomy laws in the state of Tasmania as discriminatory. The Committee's decisions are not legally binding, but politically persuasive recommendations. In this case, the state of Tasmania repealed its anti-sodomy laws a few years later in 1997. In contrast to decisions on complaints brought to the HRC, General Comments are documents where the Committee explains its interpretation of the provisions contained in the ICCPR. In 1990, the Committee published its General Comment No. 19, where it interprets Article 23 of the ICCPR on the protection of the family and the right to marry. The Committee refrains from giving a substantial definition of the family, relegating the task to States Parties and the meanings given to the concept in their national legal systems:

*The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, "nuclear" and "extended", exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.<sup>9</sup>*

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<sup>8</sup> *Toonen v. Australia*, Communication 488/1992, UN Document CCPR/C/50/D/488/1992.

<sup>9</sup> United Nations Human Rights Committee (1990), para 2.

What is essential here is the use of the principle of subsidiarity<sup>10</sup>: evaluation of what kind of relations and of which degree of proximity are deemed as family relations is handed to States, which resembles the doctrine of the margin of appreciation in the European Court of Human Rights (see Spano 2014). Reluctance to producing a universal definition of family might seem toothless from the Human Rights Committee, but it shows the humility of the experts in question. Compared to the drafters of the Universal Declaration, they do not take such a strong stand on what the family might be. Thus, the Committee's reluctance to provide a definition leaves space for new interpretations and the incorporation of a wider spectre of relations between people. When discussing the right to marry, the Committee does give a tentative definition of a couple: "The right to found a family implies, in principle, the possibility to procreate and live together"<sup>11</sup>. The right to marry refers more to the possibility of contracting a marriage together with a partner of the opposite sex of one's choice, without State interference. This provision becomes more concrete when thinking about racial and religious discrimination: the miscegenation laws banning inter-racial marriage in the United States prior to their dismantlement are a prime example. Obviously, there is always a certain degree of State intervention into the right to marry, primarily related to prohibited degrees of relationship, which vary from one State to another.

Due to the history of human rights or rather the lack of human rights in the context of vulnerable categories of people, it has been seen necessary by States within the United Nations system to create global human rights conventions that focus on the status of women (Convention on the Elimination of All Forms of Discrimination against Women CEDAW, 1979) and children (Convention on the Rights of the Child CRC, 1989), for example. Article 16(1) of CEDAW notes that women must be in an equal position to men in when it comes to marriage, divorce and the legal effects of marriage:

*1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

*(a) The same right to enter into marriage;*

*(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*

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<sup>10</sup> Subsidiarity as a principle of international law, too, is linked to the philosophy of the Catholic Church and Catholic Social Teaching. See Carozza 2003.

<sup>11</sup> United Nations Human Rights Committee (1990), para 5.

*(c) The same rights and responsibilities during marriage and at its dissolution;*

*(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*

*CEDAW, Article 16(1)*

In essence, principles of the UDHR have been spelt out in more detail in 16(1) of CEDAW, like in ICCPR and ICESCR. However, the text of CEDAW departs further from the language of the two conventions mentioned above. It develops principles of gender equality in a way that goes further than the liberal tradition prevalent, for example, in the United States would allow, and thus the United States is one of the few countries in the world that has not ratified it. (United Nations Treaty Collection, CEDAW.) Furthermore, Article 5(a) of CEDAW is also contentious in tone for the conservatively inclined as it states the following as its aim:

*To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;*

*CEDAW, Article 5(2)*

This formulation goes to show that the results of international drafting may also produce rather progressive and radical expressions of political will, developing the content given to human rights more than could be done by re-interpreting existing documents and treaties.

The definition of family or the lack thereof is unlikely to change in the committees interpreting human rights treaties of the United Nations. However, notions of what family entails and how it is understood in modern-day global human rights advocacy can be seen, for instance, in the Beijing Declaration, the final document of the Fourth World Conference on Women in 1995, which pays only slight tribute to Catholic social doctrine evident in the UDHR:

*Women play a critical role in the family. The family is the basic unit of society and as such should be strengthened. It is entitled to receive comprehensive protection and support. In different cultural, political and social systems, various forms of the family exist. The rights, capabilities and responsibilities of family members must be respected.*

*Beijing platform for Action, para 29*

Family is named as “the basic unit of society”, but it is not spelt out who constitute a family. The Beijing document was, indeed, a ‘bitter fruit’ to many conservative and religious communities due to its progressive tone (Glendon 1995).

The Convention on the Rights of the Child (CRC) from 1989 is an important global human rights convention when it comes to the protection of family life, and the interpretation of key Articles is subject to fierce debates. The text of the Convention begins with a Preamble that still holds echoes of the Universal Declaration:

*The States Parties to the present Convention... convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...*

*CRC, Preamble*

Article 2 of the Convention on the Rights of the Child deals with the principle of non-discrimination:

*(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

*(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

*CRC, Article 2*

Together with Article 2 above, Article 5 gives space to a broader definition of family than the model of the nuclear family:

*States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*

*CRC, Article 5*

The expression ‘members of the extended family or community’ and the mention of ‘local custom’ give way to the variability of family forms, to which families formed by non-heterosexuals and trans persons can be argued to take part. So many States in Europe and beyond have legalised same-sex civil unions or same-sex marriage, so it could be seen as a recent “local custom” in many parts of the world.

In debates about the legitimacy and ethics of non-heterosexual parenthood, the first paragraph of Article 7 of the CRC has often been evoked as the legal basis for the child’s right to ‘have a mother and a father’:

*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.*

CRC, Article 7

Articles 2 and 7 of the Convention are the ones that are usually cited when arguing for a particular view on the protection of family life, be it singularist or pluralist (see Chapter 1.1). Article 2(1) prohibits discrimination against the child and her/his parents “...irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. One of the most central and most cited Articles of the Convention is Article 7(1). Both pluralists and singularists have deployed this Article to argue their viewpoints – pluralists for the recognition of, for example, parenting by same-sex couples (Walker 2001, Hodson 2011, 2012), singularists for the preservation of marriage and family as exclusively heterosexual institutions in the face of law (Glendon 2009, Adolphe 2006). The right to know one’s parents is often advocated as the right to know one’s origins, be it in the context of adoption or assisted reproduction with donated sperm or eggs. Article 7 is also often deployed to argue that a child must have two parents of the opposite sexes. Singularists argue that it is distorting and illogical to interpret that ‘parents’ could be of the same sex (see Adolphe 2006, Browning 2013) while pluralists stress that everything depends on how family is defined in a given legal context (see Walker 2001, Hodson 2012).

## 2.4 DISCUSSION: FROM NATURAL LAW TO LACK OF DEFINITION

*The universal conception of the person... is displaced as a point of departure for a social theory of gender by those historical and anthropological positions that understand gender as a relation among socially constituted subjects in specifiable contexts. This relational or contextual point of view suggests that what the person “is”, and indeed, what gender “is”, is always relative to the constructed relations in which it is determined. As a shifting and contextual phenomenon,*

*gender does not denote a substantive being, but a relative point of convergence among culturally and historically specific sets of relations.*

*Judith Butler (1990: 15)*

On the basis of the research done by Morsink (1999), Cere (2009) and Glendon (2010) it is evident that the *form* of the language of Article 16 in the Universal Declaration of Human Rights was inspired by Neo-Thomist philosophy and Catholic social teaching. However, as over sixty years have shown, those words have been understood in a variety of ways, which goes to show that the *meaning* of Article 16 is often taken to be something else than what that particular phrase or specific words in a certain order would indicate. If the language and style of 16(3) was taken from Catholic social teaching, does it mean that these Articles, or even the Universal Declaration as a whole, should be read as a set of ethical guidelines emanating from a specific philosophical and religious tradition? Or could it be that the Universal Declaration is a document inspired, among other traditions, by Neo-Thomism and Catholic social thought, but over time it has acquired a variety of other meanings according to the political projects of its readers, and that it is a malleable formulation to be applied according to the spirit of the day? My answer would be to favour the latter approach, but not to forget where the language has been cited from. Some might think that such an important document carrying such a strong legacy of a particular world view would be somehow discouraging for divergent ways of thinking and future political projects. However, such exegesis is helpful in taking a critical distance from any authoritative documents and seeing them as products of their time.

‘Family’ has usually been left intentionally undefined in international human rights documents – otherwise Articles dealing with the protection of families, family relations and family life could not be thought of as universally applicable. Actually, Article 16(3) of the Universal Declaration of Human Rights is quite exceptional, as it does offer some kind of a definition, even though it is a more open-ended version of what Malik, who has been identified as its main architect (Morsink 1999) would have preferred. However, the textual appearance of this Article as a linguistic formulation pays close resemblance to the language of Catholic social ethics as a comparison to Article 41.1.1 of the Constitution of the Republic of Ireland shows. Some might say that they are mere words in a certain order. However, the language deployed shows that in 1948, the States voting for the adoption of the Declaration saw it fit to deploy language similar to Catholic social doctrine, which is evident in other parts of the Declaration as well. Undoubtedly, Catholic social ethics is a mode of thought that captures many essential strains of thought of human rights thinking. However, when it comes to family as a gendered institution, the legacy of a particular current of religiously coloured philosophical thought is problematic. Probably the rights of women and children as legal subjects in their own right, not subjected to the power of the head of the family, the

husband and the father, would not have been developed to the same extent as they have been in the form of CEDAW and CRC if they had been interpreted in the spirit of Neo-Thomism and Catholic social doctrine. Obviously, due to the history of the origins of the concept of family in the Universal Declaration, many value-conservative interpretations of what family means today resonate clearly with the language and the spirit of the Universal Declaration. However, despite being a product of multilateral drafting and without a comparable historical precedent, the Declaration itself is a politically, religiously and historically situated document and needs to be treated as such.

The definition or the lack of definition of family will hardly change in the United Nations. Those in favour of a singularist approach argue that Article 16(3) of the Universal Declaration the “family is the natural and fundamental group unit of society” has been established as part of customary international law (Adolphe 2006: 370). However, a great many States have already given a new interpretation of what family is, by legalising same-sex marriage with (more or less) the same rights and obligations as in opposite-sex marriage. This is due to a further interpretation of the promise of equality inherent in the Universal Declaration itself. Contemporary debates on the status of sexual and gender minorities in international human rights protection are, to many people, a logical consequence of the human rights rhetoric and the principles of equality and the prohibition of discrimination enshrined in the Universal Declaration and other major human rights documents of the era after the Second World War. As the same Articles and formulations in, for example, the Universal Declaration or the Convention on the Rights of the Child, can be and are used to argue completely opposing viewpoints, does this mean that human rights provisions are mere vehicles of the political desires and imagination that various groups argue for when presenting their view on what is right? Relying on Dembour and her typology of different schools of human rights (2006, 2010), this could well be the case.



### 3 ANALYSING FAMILY RELATIONS IN EUROPEAN HUMAN RIGHTS LAW

*Since philosophical commonplaces do not have a nontemporal significance and implication, their determination depends upon the concrete context in which they operate. For this reason, the principle of equality in law and morality cannot be defined or understood, like the formal and mathematical equality, abstractly and a-historically. In the same way, the idea of justice leads to different practical requirements in various and diverse societies and eras.*

*Chaim Perelman (1980: 158)*

Just like the United Nations in the role of an intergovernmental organisation and a regime of international law, the regional organisations of the Council of Europe and the European Communities (now known as the European Union) were created in the 1940s and 1950s with the aim to avoid the atrocities of the Second World War happening again. The Council of Europe (an intergovernmental organisation completely separate from the European Union) took as its central task to promote democracy, human rights and the rule of law, while the European Communities began to hinge Western European nations together through economic integration, starting with coal, steel, and the former enemies France and Germany in order to integrate them economically for the sake of both peace and prosperity. Nowadays, despite being a primarily economic and political union of independent States, the European Union has also become an intergovernmental structure for the promotion of democracy, human rights and the rule of law together with intergovernmental organisations more specifically devoted to the promotion of human rights and democracy, such as the United Nations, the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE).

The Universal Declaration of Human Rights (UDHR) from 1948, regardless of being just a ‘declaration’ and thus not legally binding on the States that adopted it, has been a seminal document for binding international human rights treaties within the United Nations and beyond. It has acted as a catalyst for regional human rights instruments such as the European Convention on Human Rights and Fundamental Freedoms, which was adopted by the Council of Europe in 1950 and has been further elaborated through 14 additional protocols over the years<sup>1</sup>. To this day, the Council of Europe and the European Court of Human Rights form the most sophisticated regional human rights system in the world as the European Court in Strasbourg has developed such

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<sup>1</sup> See <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>. (Accessed 16 October 2015).

a vast body of case law on the European Convention. (Ovey and White 2006: 1-6.)

In this chapter, I will first give an overview of how the concept of “family” has been dealt with in human rights documents within the regional, European context. These documents consist of treaties of the Council of Europe and of the European Union. As the Council of Europe with its European Court of Human Rights in Strasbourg and the European Union with the European Court of Justice in Luxembourg are in a mutual relationship both institutionally and jurisprudentially, the treaties these Courts interpret are also of high relevance to each other. In the following sections, I describe the conceptual tools with which I approach my data. With the help of definitions and notions provided by the jurisprudence developed by the European Court of Human Rights itself, a typology of biological, legal, social and gendered relations is developed in this study. This typology is used as a tool for analysing relevant case law in the three subsequent empirical chapters. This chapter goes on to map how the data for this study, case law on the recognition of family relations in the European Court of Human Rights in Strasbourg, has been selected and analysed in order to provide a sociological and qualitative analysis of how privileged personal relationships are protected in case law of a supranational human rights court.

### **3.1 FAMILY IN EUROPEAN HUMAN RIGHTS DOCUMENTS**

*I cannot see any reason why legal recognition of reassignment of sex requires that biologically there has also been a (complete) reassignment; the law can give an autonomous meaning to the concept of “sex”, as it does to concepts like “person”, “family”, “home”, “property”, etc.<sup>2</sup>*

*Judge Van Dijk of the European Court of Human Rights, 1998*

The Council of Europe is by far the most firmly established of all regional human rights systems in the world. This is mainly due to the wide ratification of the European Convention on Human Rights and Fundamental Freedoms and the existence of the European Court of Human Rights which develops the interpretation of the Convention in its case law. The European Convention has been subject to thousands of legally binding judgements as it permits individual complaints arising from legal disputes between individuals and States. Thus, if a legal complaint in the national legal system of a Member State of the Council of Europe has exhausted the possibilities of complaining further to a higher level within the national system, of which the highest is usually

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<sup>2</sup> *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, Reports of Judgments and Decisions 1998-V, Dissenting opinion, para 8.

called “supreme court” or the like, the applicants may complain to the European Court of Human Rights, which may grant them a favourable judgement and order the State in question to pay damages to the applicant(s), or not if the case is not deemed that relevant or the issue at hand remains in the margin of appreciation of the State (see Johnson 2013: 69-76)

Marriage and family life have been dealt with in several human rights treaties of the Council of Europe as well as treaties of the European Union. The foundation of human rights protection in the Council of Europe is the European Convention on Human Rights and Fundamental Freedoms opened for State signatures in 1950 and its optional Protocols (especially Protocol 12, adopted in 2000, with regard to the prohibition of discrimination) and the European Social Charter (adopted in 1961, revised in 1996). European human rights norms have also been interpreted in the context of the Treaties of the European Union. The Charter of Fundamental Rights of the European Union (proclaimed in 2000, entered into force in 2009 as part of the Treaty of Lisbon) provides further elaboration of human rights norms relating to family life, too.<sup>3</sup>

A considerable part of the case law of the European Convention on Human Rights touches upon the protection offered by Article 8 of the Convention, the right to respect for private and family life, the home and correspondence. Out of the almost 38,700 judgements and decisions delivered by the machinery of the European Court between 1959–2014 and available on the Hudoc database, 1,365 documents (some of them overlapping and concerning the same complaint) have been delivered concerning Article 8 with the keyword “respect for family life” in the search function of the database of ECHR case law, *Hudoc*. Out of these documents, about 560 are judgements where a Chamber of the European Court has admitted the case for full procedural treatment and delivered a reasoned judgement on it with a composition of seven judges. 40 of these judgements have been sent additionally to the Grand Chamber, the highest instance in the European Court of Human Rights, where cases of exceptional complexity are adjudicated with a larger group of seventeen judges.<sup>4</sup> Decisions, a category of lower importance in the hierarchy of documents in the ECHR system, constitute legally and sociologically relevant material if they pronounce the application made against a certain Member State inadmissible, that is, not worthy of full court procedure and a judgement. It is here where many applications to the European Court have ended up over the decades: for example, many complaints to the Court by same-sex couples for the protection of private and family life were deemed inadmissible because it was not seen to be within the scope of the European Convention to protect

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<sup>3</sup> See list of relevant Treaties in Sources.

<sup>4</sup> Hudoc database, situation on 4 April 2016.

same-sex adult relationships when they were legally not in the same position as opposite-sex married couples or cohabitantes<sup>5</sup> (Grigolo 2001, Johnson 2013).

As noted by Ovey and White in a textbook on the European Convention as a whole, “the rights protected in the European Convention draw their inspiration from the Universal Declaration, but do not simply duplicate the rights referred to there” (2006: 2). The European Convention was adapted to the interests, needs and the context of the twelve original signatory States<sup>6</sup>, mainly Western European States, bearing in mind the horrors of the Second World War and the threat of communism perceived at the time (Ovey and White 2006: 2). The European Convention was drafted in the late 1940s, opened up for signature in 1950 and entered into force in 1953 after it was ratified by the first wave of Western European States. Later on, especially after the breakdown of the Soviet Union, a great number of Eastern European States joined the Council of Europe and ratified the European Convention on Human Rights. After its emergence in the 1950s, the European Convention has been further developed through optional Protocols, ratified by Member States. A lot of the norms developed through these Protocols relate to technical or procedural matters. However, for example Protocol 12 elaborates the prohibition of discrimination but has not been ratified by all Member States.

The wording of Article 8 of the European Convention, the most often cited right in the cases analysed in this study, is illuminated to a certain degree by the *travaux préparatoires* (preparatory works) of the European Convention from the time it was being written in the era after the Second World War. Article 8 of the European Convention reads that “Everyone has the right to respect for his private and family life, his home and his correspondence”. In the preparatory works on Article 8 of the ECHR, the first source cited is Article 12 of the Universal Declaration of Human Rights, which is worded as follows

*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*<sup>7</sup>

*Preparatory works on Article 8 of the ECHR*

Thus, what the European Convention says about family life relates to the protection of privacy understood as the private sphere of close personal relations, one’s domicile and communications. In addition, there is Article 12

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<sup>5</sup> For example, *S. v. United Kingdom*, no. 11716/85, Commission decision 26<sup>th</sup> August 1986, *C. and L. M. v. the United Kingdom*, no. 14753/89, Commission decision of 9 October 1989, *Kerkhoven, Hinke and Hinke v. the Netherlands*, no. 15666/89, Commission decision of 19 May 1992.

<sup>6</sup> Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey and the United Kingdom (Ovey and White 2006: 2)

<sup>7</sup> See <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>. (Accessed 16 October 2015).

of the European Convention, which says that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”. Thus, what the European Convention says about family formation and family life relates to the protection of privacy, the right to marry and to reproduce according to accepted norms, but the ECHR does not contain a definition or a proclamation of what family “is” in the spirit of Article 16 of the UDHR with its definition of family as “natural” and “fundamental” unit of society. In short, the words signalling the legacy of Catholic Social Teaching have not been included.

The word ‘family’ does not appear on its own, only as part of the concept of “family life”. However, in the decades that follow the drafting of the Convention, the meaning of the concept of family has indeed come under scrutiny in the European Court, but due to the phrasing of Article 8, it needs to be phrased as “right to respect for (private and) family life”. Thus, ‘private life’ acts as the main sphere to be protected, including a wide array of issues such as identity (see e.g. *Goodwin v. the United Kingdom* from 2002<sup>8</sup> on transgender identity) and sexuality (e.g. *Dudgeon v. the United Kingdom* from 1981<sup>9</sup>). Family life is a privileged sphere within private life, and the liminal category of ‘*de facto* family life’<sup>10</sup> has recently been enlarged to apply to same-sex couples as well in *Schalk and Kopf v. Austria*<sup>11</sup>. As we can see from paragraph 2 of Article 8, this is a qualified right, where the exercise of the right can be limited due to a number of reasons relating to the functioning of the State or the well-being of its citizens. For example, in the 1950s there were several complaints filed against the Federal Republic of Germany because of its legislation criminalising homosexual relations. All of these complaints were deemed inadmissible, as the existence of these laws was seen as legitimate for the ‘protection of health and morals’ (Grigolo 2001: 1029, see also Johnson 2013: 22-29). Balancing between this main substance of Article 8 and State interests listed above is what makes the case law under Article 8 so interesting also from a sociological point of view.

Thus, Article 8 of the European Convention on Human Rights reflected the need to protect privacy and family life as well as one’s home from arbitrary interventions of the State:

*(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

*(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and*

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<sup>8</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

<sup>9</sup> *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45.

<sup>10</sup> “*De facto* is defined to mean “in fact, in reality, in actual existence, force, or possession, as a matter of fact” by the Oxford English Dictionary (OED 2015). This translates also to “family life in practice” or “informal family life” in the context of the ECHR.

<sup>11</sup> *Schalk and Kopf v. Austria*, para 94.

*is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

*ECHR, Article 8*

Furthermore, Article 12 of the Convention reads “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” Article 12 has been subject to much less jurisprudence, as it surfaces in a little over 150 judgements and decisions of which less than 27 are judgements by the end of 2014. These judgments do not all concern the “right to marry” but “the right to marry and to found a family” more broadly.<sup>12</sup> However, this Article has been the bone of contention in recent case law regarding the right to marry in the context of same sex-couples, such as *Schalk and Kopf v. Austria* from 2010<sup>13</sup>. It has also been challenged in the case of a transgender person who was married before her gender recognition process from male to female was completed in *Hämäläinen v. Finland* from 2014, a Grand Chamber judgement<sup>14</sup>. The wording of Article 12 leaves a wide margin of appreciation to Member States, as the wording of the article relegates the exercise of the right back to national legislation. So far, in the judgements mentioned above, the European Court has ruled that the European Convention does not lend support to the interpretation that States could be pushed to provide the possibility of same-sex marriage.

Article 14 is also of great importance, as it is often technically paired with Article 8 in order to evaluate the case from the point of view of the prohibition of discrimination in the context of, for example, the right to respect for family life:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

*ECHR, Article 14*

Of significant importance to the protection of family life is Protocol 12 of the European Convention, which focuses on the prohibition of discrimination as its Article 1 proclaims:

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<sup>12</sup> Hudoc database, 1 April 2015.

<sup>13</sup> *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

<sup>14</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

*The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

*No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

*Protocol 12, ECHR*

Protocol 12 was adopted in 2000 and entered into force in 2005. However, it has been ratified only by less than twenty states of all 47 Member States, thus not being a very effective instrument in the protection of minorities or other groups subject to discrimination.<sup>15</sup>

The Council of Europe is the organisation between a considerable number of other intergovernmental documents and treaties in the region of Europe and Eurasia. However, none of them are of the same importance as the European Convention of Human Rights as it has accumulated such a vast body of case law. In any case, a glimpse into other key documents of the Council of Europe and the European Union helps to shed light on how the protection of “family” is phrased in documents that have appeared after the European Convention. The European Social Charter, another document of the Council of Europe, has not been of central importance in defining European human rights policies, but it does offer a view into how rights related to family life have been conceived from the viewpoint of social rights. In its first, original version, adopted in 1961, the most important rights related to family life replicated the spirit of the Universal Declaration of Human Rights:

*4. All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families...*

*16. The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.*

*17. Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.*

*European Social Charter, 1961*

The family is a “fundamental unit of society” in the spirit of the Universal Declaration of Human Rights, and non-marital mothers and children deserved a special mention even in the pre-Marckx era. In its revised version from 1996,

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<sup>15</sup> Protocol 12 of the European Convention on Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG>. (Accessed 9th April 2015.)

family is the fundamental unit of society, but the protection of mothers and children has changed into the protection of children and young persons.

Compared to the earlier version, a provision was added concerning the protection of combining work with family responsibilities:

*16. The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.*

*17. Children and young persons have the right to appropriate social, legal and economic protection...*

*27. All persons with family responsibilities and who are engaged or wish to engage in employment have a right to do so without being subject to discrimination and as far as possible without conflict between their employment and family responsibilities.*

*Revised European Social Charter, 1996*

The Council of Europe and the European Union are two separate intergovernmental organisations, but they are linked to each other in important ways. For over twenty years, membership of the Council of Europe and ratification of the European Convention on Human Rights have been central requirements that new Member States of the European Union need to fulfil since the accession criteria to the EU were defined in 1993<sup>16</sup>. Thus, for example, the decriminalisation of homosexuality is a human rights norm that new Member States of the EU have to abide with – a norm that has not been seen as such by many States within the United Nations on a global level (see O’Flaherty and Fisher 2008). The Charter of Fundamental Rights of the European Union was incorporated in the Treaty of Lisbon signed by EU Member States in 2007, and came into effect in 2009 when the its ratification process came to an end. It is an example of the evolution of human rights principles in Europe, giving an indication of the changes that have taken place within the Member States of the European Union, compared to the wide geographical and political scope of the Council of Europe or the ‘universal’ human rights documents of the United Nations.<sup>17</sup>

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<sup>16</sup> These are referred to as the “Copenhagen criteria”, see “Accession Criteria” in Sources. The condition of adhering to the European Convention on Human Rights in order to be a Member State of the European Union is spelled out in Article 6(3) of the Treaty of the European Union (amended version known as the Lisbon Treaty): “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community, see Treaties in Sources.

<sup>17</sup> Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community, see Treaties in Sources.



The interrelationship of the Council of Europe and the European Union, or the European Convention on Human Rights and the European Union as a political entity has been tested as the EU was to become a signatory of the European Convention. This means that even though the European Union is not a sovereign state like the other signatories of the Convention, it would be bound by the human rights norms of the Convention directly and not just through its Member States. The accession of the European Union to the ECHR became an obligation in 2009 when the Treaty of Lisbon entered into force, and the accession negotiations and legal processes related to it have been in process since. In December 2014, the European Court of Justice delivered a negative opinion on the accession of the European Union to the European Convention, and at the moment the accession process has come to a standstill<sup>18</sup>.

Article 7 of the Charter of Fundamental Rights of the European Union deals with respect for private and family life in the spirit of Article 8 of the European Convention: “Everyone has the right to respect for his or her private and family life, home and communications”. Article 9 of the Charter, which articulates the ‘right to marry and right to found a family’ is especially notable as it makes no mention of gender: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. On the other hand, like Article 12 of the European Convention, it relegates the responsibility back to individual States. Paragraph 1 of Article 21 is also hugely important, as it explicitly mentions sexual orientation as unacceptable grounds for discrimination: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Article 23, in turn, articulates that “[e]quality between men and women must be ensured in all areas, including employment, work and pay”. This is important in cases of spousal or partner benefits as well as arrangements relating to parental care.

Compared to the European Convention, the Charter is also important as it includes children’s rights. In Article 24, the well-recognised doctrine of the ‘best interest of the child’ is made explicit:

*(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*

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<sup>18</sup> See *Opinion 2/13 of the Court (Full Court) of 18 December 2014* of the European Court of Justice on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

*(2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*

*EU Charter on Fundamental Rights, Article 24*

Furthermore, Article 33 refers to the protection of ‘the family’:

*(1) The family shall enjoy legal, economic and social protection.*

*(2) To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.*

*EU Charter on Fundamental Rights, Article 33*

What family is, then, in a European culture of human rights, is subject to a temporally situated and shifting interpretation of the principles spelt out in these documents. What is understood as “family” varies a great deal across States and different parts of their populations due to (but not restricted to) differences in political and religious outlooks and pure personal opinion. As can be seen from the timeline of case law analysed in this study<sup>19</sup>, during the last few decades of the 20<sup>th</sup> century, the most pertinent legal questions in the European Court of Human Rights have been the status of marriage and children born to unmarried mothers<sup>20</sup> as well as the decriminalisation of homosexuality<sup>21</sup> and the boundary between private and family life<sup>22</sup>. In the 2000s and 2010s, the focus in ECHR case law on the parameters of family life has been even more on gender and sexuality in the context of same-sex couples, single non-heterosexuals and transgender persons.

### **3.2 INTERPRETATION OF ECHR AND TYPES OF FAMILY RELATIONS**

The interpretation of the European Convention is a highly specialised field practiced by the judges elected to their positions to reflect and to provide expertise on the Member States of the Council of Europe. One judge is elected in respect of each Member State and is also supposed to provide expertise on the State in question when adjudicating cases in groups of judges (see e.g. Dembour 2006: 19-29). The interpretation of the Convention is subject to certain main principles or doctrines developed by the Court over the course of

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<sup>19</sup> See chronological list of data in Appendix I.

<sup>20</sup> *Marckx v. Belgium*.

<sup>21</sup> *Dudgeon v. the United Kingdom*.

<sup>22</sup> *Schalk and Kopf v. Austria*.

its existence. For understanding the context and language used in the case texts, the main principles are discussed here: dynamic interpretation of the European Convention, emerging European consensus, the margin of appreciation afforded to Member States, negative and positive duties to promote human rights and autonomous concepts within the case law.

The dynamic and contextual interpretation of the European Convention is a guiding principle developed by the European Court of Human Rights itself in its jurisprudence over the years (Ovey and White 2006: 44-45, Johnson 2013: 84-85). This technique, also called evolutive interpretation, was first applied by the Court in 1978 in the case of *Tyrer v. the United Kingdom*<sup>23</sup>: “The Court must... recall that the Convention is a living instrument which... must be interpreted in the light of present-day conditions”<sup>24</sup>. Judged by its literal appearance, this doctrine offers the possibility of accommodating social and political change. However, due to its institutional design, the Court more often reacts to existing circumstances and legal change that has already taken place in a considerable number of European States, i.e. Member States of the Council of Europe, parties to the European Convention. This is what is called emerging European consensus (Johnson 2013: 77) when a number of States have already enacted legislation regarding a certain right, other States lagging behind these developments are expected to follow suit in order to produce a Europe-wide norm and level of human rights protection. *Marckx v. Belgium* (1979) acts as a textbook example of this, as at the time Belgium was one of the very few States that had not made the status of children born within and outside marriage equal. The practical problem with the relevance and applicability of the European Convention is that as Member States of the Council of Europe span from Iceland to the Russian Federation, lack of consensus prevails on numerous issues. Thus, States are often accorded a wide margin of appreciation to decide what is appropriate for the prevailing social, cultural and moral climate in the country (see Ovey and White 2006: 52-54). It is this doctrine that most often produces negative judgements from the European Court as a certain issue is then regarded as falling outside the need to pronounce a new norm that Member States must then change their legislation to comply with.

Negative duties to respect human rights fall on States concerning the need to make sure that people are free to act without unnecessary State interference (for example, in this study, interference in the right to marry between in-laws, that is, non-consanguineous relatives<sup>25</sup>) and positive duties oblige States to advance the flourishing of human rights actively. Positive duties may well be effectively argued for, but they tend to be caught in the limbo of the margin of appreciation (Ovey and White 2006: 51-52). ‘Family’ and many other complex and extra-legal concepts that are hard to pin down, are regarded as

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<sup>23</sup> The case concerned the legality of corporal punishment in a school on the Isle of Man.

<sup>24</sup> *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, para 31.

<sup>25</sup> See *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005 and Chapter 4.1.

“autonomous concepts” in the jurisprudence of the ECHR. According to Letsas, this means that

*... domestic law classification is relevant but not decisive for the meaning of the concepts of the Convention. This is what the adjective ‘autonomous’ stands for: the autonomous concepts of the Convention enjoy a status of semantic independence – their meaning is not to be equated with the meaning that these very same concepts possess in domestic law.*

*George Letsas (2007: 42)*

As Letsas elaborates, the purpose of the doctrine of autonomous concepts, developed in the judgement of *Engel v. the Netherlands* in 1976<sup>26</sup> concerning disciplinary measure targeted at soldiers, is that Member States are not allowed to circumvent the human rights guarantees of the ECHR by merely naming a concept differently than the European Court. As noted in the quote above, the definition given by a State to a concept is relevant, but not the whole truth, as an evaluation of the concept by a supranational court may help in transcending the legal realm and imagination of a particular Member State. (Letsas 2007: 40-46.)

Thus, the Court operates in its jurisprudence so that concepts that are of substantial importance, such as “family”, “home” or “property” (see opening quote to this sub-chapter by Judge Van Dijk of the European Court<sup>27</sup>) obtain a meaning of their own within the case law of the European Court. For example, what “marriage” means in the legal and political context of the Republic of Ireland is different than in context of the Netherlands, and the European Court is supposed to give a meaning of its own based on the interpretation of the European Convention, which, then, probably falls between these two extremes in the European context.<sup>28</sup> Due to the formulaic language applied in the reasoning of the Court, the focus in the analysis performed in this study is on extra-legal knowledge and definitions given on what family life and family relations might be.

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<sup>26</sup> *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

<sup>27</sup> *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, Reports of Judgments and Decisions 1998-V, Dissenting opinion, para 8.

<sup>28</sup> The European Court first pronounced this principle in the inadmissibility decision of *Twenty-one detained persons against Germany* from 1968 where a group of prisoners complained of inadequate remuneration of work carried out during their time in prison: “Whereas the term “civil rights and obligations” cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but relates to an autonomous concept which must be interpreted independently, even though the general principles of the domestic law of the High Contracting Parties must necessarily be taken into consideration in any such interpretation...”. *Twenty-one detained persons against Germany*, 3134/67..., Decision, Commission (Plenary), 6th April 1968.

Stéphanie Lagoutte (2003), a legal scholar and an expert on ECHR case law who has performed a study of the concept of family life in the ECHR<sup>29</sup> (see also Liddy 1998; Stalford 2002; Gouttenoire 2008), points out that there is no precise definition to be found for what the term “family life” covers neither in the text of the Convention itself nor its *travaux préparatoires* (Preparatory Work on Article 8). The European Court has consistently professed a so called “contextual approach” to the interpretation of the Convention, which means focusing attention to the facts of the case and the issues that it gives rise to (Lagoutte 2003: 293). Thus, by refraining from reviewing the domestic law of its States Parties on an abstract level, it may keep a distance to taking a moral stand on sensitive issues such as sexual mores or abortion. However, the notion of family life is a prime example of an “autonomous concept” to be interpreted independently of the domestic (national) law of the States Parties (Letsas 2007). Furthermore, dynamic interpretation of the Convention is closely linked to the notion of family life in its case law; norms related to family life are to be interpreted in a manner that reflects social change in States Parties, which is linked to emerging consensus in States Parties on various issues relating to moral standards. (Lagoutte 2003: 292-4.) Lagoutte states that “family life protected by ECHR Article 8 is an individual attribute: it is not the family per se that is protected, but the family life of the individual” (2003: 294). However, the concept of family life does not solely concern relationships between individuals, but other elements pertaining to their personal life as well, such as identity, family home and social life. The notion of family life is not completely straightforward, but supposedly this makes it possible to include other aspects within it besides interpersonal relationships. Interpersonal relationships falling within the ambit of the notion of family life are, for example, relations between married and unmarried (opposite-sex) couples and legally recognised relationships between parents and their children, including foster parents and step-parents.

Historically, the European Court of Human Rights has operated and still operates with a clear distinction between “private life” and “family life” in case law concerning Article 8 of the Convention. Family life is part of private life, but consists of a privileged set of close personal relations within it, based on or comparable to a grid of genders and generations of heterosexual marriage and family formation (see Chapter 1.2). Respect for one’s home and correspondence is also covered by Article 8, but these two fields of application have not produced as much case law as the notions of ‘private life’ and ‘family life’ have. The concepts of ‘family’ as a social and political institution and ‘family life’ as a sphere of private life are not interchangeable, as ‘family’ is a concept relating to an abstract structure of relations behind everyday practices, and ‘family life’ refers to the protected sphere of everyday life that

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<sup>29</sup> In this article Lagoutte also refers to her unpublished PhD dissertation concerning the same theme (University of Aarhus and University of Paris I Panthéon-Sorbonne), defended in Paris 21 June 2002.

Article 8 seeks to protect. For the purposes of my analysis, I define family relations as a set of State-recognised privileged personal relations between individuals that embody or emulate genealogical principles of prohibited degrees of relationships and genetically reckoned descent. This resonates with Irène Théry's widely cited, Freudian-inspired notion that family is an institution that articulates the difference between the sexes and the difference between generations (Théry 1996, see also Fassin 2000 and Théry 2007).

However, I wish to draw attention to the fact that the relations that people classify as family relations from an emic point of view are not always subject to genetic or other kinds of juridical proof, but tend to both follow and offer variation in terms of gender and sexuality to established forms of heterosexual family formation – hence the word 'emulate' in my definition. The question of privilege is important in relation to the State, as only certain forms of close personal relations (monogamous sexual adult-adult relations, parent-child relations) count as family relations and involve officially sanctioned rights and duties between the persons concerned. One might call one's closest friends 'family', but these kinds of constellations of relationships are rarely argued to exist in the eyes of the State. A couple or a group of individuals enter into family life when they organise their life jointly according to genealogical principles of classification between categories of persons and possibly make these relations official e.g. through marriage or declaration of paternity. On the other hand, as kinship relations are to a great extent linguistic categories forming kinship systems and 'languages' of their own (see Lévi-Strauss 1958:58 and Chapter 1.1), it is important to note that variation and social change usually occur with the help of applying existing structures and categories. Thus, if a child has two parents of the same sex, they might be called "two mothers" or "two fathers" e.g. in media parlance, even if this does not coincide with what these family members call each other or how they are referred to by State bureaucracy or domestic legislation. Law has an important role in this field as it participates in the creation of widened and re-negotiated categories e.g. in the case of family formation by non-heterosexuals.

According to the ECHR, married couples and children born to them within marriage all share family life by definition.<sup>30</sup> The automatic inclusion of marriage-based relationships raises the question of gender-neutral marriage, already a legal reality in several Member States as well as civil partnerships which are possible in a few other States party to the European Convention. The judgement of *Schalk and Kopf v. Austria* from 2010 contained modest support for the idea that relationship of a same-sex couple constitutes family life, and not just private life, but the bone of contention in the case, same-sex marriage, was not interpreted as a right protected by the European Convention. Case law in this area is under continuous contestation and strategic litigation by LGBT organisations. Even though same-sex couples sharing family life instead of private life has so far received only modest and disparate forms of support

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<sup>30</sup> *Berrehab v. the Netherlands*, 21 June 1988, Series A no. 138, see Kilkelly (2001: 15-19).

from the European Court, what Lagoutte argued already in 2003 is true: “...by accepting a larger and more elusive definition of family life, the European Court of Human Rights has also created a greater uncertainty in its practice” (2003: 306). This “uncertainty” does not necessarily mean a dismal future in the realm of protection of family life but, rather, a wide forum of contestation when it comes to established norms of family life and a great deal of work for the European Court as new applications keep coming in. It also goes to note that the ‘uncertainty’ referred to by Lagoutte in 2003 did not really refer to the issue of non-heterosexual family formation, as at the time such relations were squarely in the realm of private life, not family life in the case law of the European Court.

As Lagoutte has pointed out in her analysis, relationships between family members are identified and evaluated by the European Court with the help of the concepts of biological, legal and social relationships. In the case of *Kroon and others v. the Netherlands* <sup>31</sup>in 1994 the European Court noted that

*In the Court’s opinion, “respect” for “family life” requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the “respect” for their family life to which they are entitled under the Convention.*

*Kroon and others v. the Netherlands, para 40*

In this particular case, the absent husband of a woman who had given birth to a child born out of a new relationship was designated as the father of the child because the woman was still officially married to her him when the child was born. Under Dutch law, the husband whose whereabouts were not known after he left his wife was the only one who could contest his paternity. In the case law of the European Court, the convergence of biological, legal and social relations emerges at least implicitly as a cultural ideal, as such situations are less prone to disputes about the existence of family life between the individuals concerned.

Lagoutte argues that situations where two of the three types of relationships exist tend to fall into the category of family life, but standing alone these types of relationships do not usually constitute family life (2003: 292). A classic example of a legal and social relation is adoption, which has existed as a legal fiction from the time of codification of Roman law (Maine 1861; see also Schneider 1987: 172). Families in which children who have been born with the help of artificially assisted reproduction using donated gametes are another contemporary example. Biological and legal relationships could be

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<sup>31</sup> *Kroon and Others v. the Netherlands*, no. 18535/91, 27 October 1994, Series A no. 297-C.

said to exist in situations where social ties between a biological and legal parent and her or his child are fully or quasi-nonexistent, for instance when the primary family context for a child is long-term foster care but s/he remains legally related to her or his biological parent(s), or in the case of absent parents (most often fathers). As to the third combination of two types of relations, in the case law of the ECHR there are cases where the existence of a biological and social relation has been evoked as the basis for its acknowledgment as an official relation.

As Lagoutte has pointed out, standing alone these types of relations are not enough to be acknowledged as family relations that constitute family life. For example, a purely biological relationship exists between a sperm or egg donor and the child born with the genetic imprint of the donor. For example, it has been established in the case law of the ECHR that a sperm donor does not have rights over a child born with the help of this donation<sup>32</sup>. Purely legal relations must be rare, but could be said to exist between official guardians and their adopted children who have been placed elsewhere to be cared for. Purely social relations are perhaps most interesting in today's situation, where the social and legal recognition of purely social parenthood of e.g. non-biological parents in families formed by same-sex couples is subject to political debate, as this type of family relations tries to make its way towards official acknowledgement through intra-familial adoption or other measures where the social relation would be turned into a social and legal relation.

Irène Théry (1996) offers a similar typology of family relations in her article *Différence des sexes et différence des générations* which appeared in the Left-leaning Catholic journal *Esprit* in the heyday of the *Pacs* debates in France. She identifies three elements of family relations: 1) biological, 2) domestic and 3) genealogical. In essence, these three elements are the same that have been described above: biological relations are the most self-explanatory element, domestic relations are equivalent to social relations and genealogical relations are equal to legal relations, albeit from a slightly different point of view. To Théry, biological relations are factual and thus subject to proof. However, she does not touch on whether this is merely genetic proof and how gestation would be seen in contrast to genetic ties in the case of maternity. Domestic relations are also a question of facticity for Théry. She prefers this term to 'social' or 'psychological' parenthood, as she emphasises the importance of cohabitation in the constitution of these kinds of relationships. The third type of relations, genealogical relations, is not subject to proof, but to the process of institution, i.e., they are instituted. (Théry 1996.)

When naming these relations 'genealogical' Théry makes reference to the work of Pierre Legendre, a psychoanalyst, jurist and a specialist in canon law (see e.g. Legendre 1985), who stresses that filiation becomes intelligible only when it places individuals in a symbolic system of kinship (Théry 1996: 78). Thus, Théry's distinction of biological, domestic and genealogical relations

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<sup>32</sup> *J.R.M. against the Netherlands*, no. 16944/90, Commission decision of 8 February 1993.



offers a more “sociological” alternative to the notion of biological, legal and social relations, which does not really problematise the substance of these different types of relations. In Théry’s schema, the idea of genealogical relations provides the most interesting object of reflection, as it in a way integrates biological, legal and social relations under the same notion and stresses their intertwinement. Individuals are may be abstract subjects with entitlements, duties and criss-crossing relations, but they can also be situated in a genealogical grid where everyone has their specific location according to their sex and generation. This imaginary genealogical grid is a way to illustrate what the symbolic order of kinship might look like in practice.

Théry starts off with thoughts on the family as an institution, asking whether it has changed from an institution transmitting moral and economic patrimony to a relational network that focuses on the construction of personal identities. She associates institutions with solidarity, duty and chains of relations that extend over generations, whereas she sees networks as characterised by personal demands and desire (1996: 66). The division into public and private, close to the view of the European Court, can be seen right away: family is connected with ‘suprapersonal’ values, such as intergenerational solidarity and chains of human reproduction. Other arrangements may appear similar, but they are not seen to have intergenerational connections or to participate in the reproduction of society; by being private, they are singular, cellular and ephemeral. These private networks do not participate in the process on instituting: “the characteristic of humanity is to institute, that is to place into signification” (Théry 1996: 67). This Legendrian notion of the importance of placing human relations in a pre-given, pre-ordered and gendered structure is highly interesting as it offers the possibility of opening these pre-given categories to new definitions.

How could one conceptually reconcile the idea of kinship as articulating the difference between the sexes and generations and the empirically evident change, albeit controversial (political demands, legislation, reinterpretation on non-discrimination in family matters) taking place in several Western societies regarding how family is understood? As noted by Théry, the idea of the institution of family articulating the difference between the sexes and between generations is an abstraction based on all forms of family and kinship known (1999: 166, see also Fassin 1998). Perhaps the interesting question to ask is not whether a phenomenon such as family formation by same-sex couples is compatible with an order of gender and generation, with the answers being “yes or “no”, but to what extent this follows the patterns and models already given by the idea of a grid of gender and generation. If there is no gender differentiation between the two adults who head a group of persons they call their family, there are often a variety of other traits they share with the majority of families in a given society, such as a relationship of alliance between these two adults, a common residence, and responsibilities to nurture, care and provide for the possible minors in the family.

I suggest that the typologies of family relations spelled out by Lagoutte (biological, social and legal) and Théry (biological, domestic and genealogical) should be complemented with a fourth dimension of the order of family life, namely gendered relations, as it is an essential part of what the European Court, or Théry, for that matter, deem intelligible. However, due to a quasi-egalitarian rhetoric of gender-neutrality especially evident in legal language, it is not usually spelt out. As to the evidence of a gendered dimension of family relations in my data from the European Court of Human Rights, a passage from the judgement of *X, Y, and Z v. the United Kingdom from 1997*<sup>33</sup> may be cited. In this judgement, the European Court gave its closest definition of family life to date:

*When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.*

*X, Y and Z v, the United Kingdom, para 36.*

The European Court has consistently applied these criteria in its case law, but the context of *X, Y and Z* and its gender-bound outcome highlight the gender-blindness of the definition. In this judgement, adjudicated by the Grand Chamber, the highest and most authoritative body of the European Court, X, a post-operative female-to-male transgender person, his female companion Y and their child Z conceived by artificial insemination, sought to have X registered as the father of Z in her birth certificate. English law at the time still regarded X as a woman, and the European Court ruled in favour of the United Kingdom in the case<sup>34</sup>. Judging by the wording of the definition, the relationships between X, Y and Z would seem to fulfil the criteria of family life. However, they fell short of it as they did not fulfil the criteria of the rather unspoken and implicit order of the complementarity of the sexes, as X's reassigned male gender was not fully recognised.

Thus, I argue that there is a fourth type of relationship that exists in the sphere of family life in the ECHR besides biological, legal and social relationships, which cover most of the tangible and conceptual aspects related to family relations, but leave the gendered aspects of these relations untouched. This fourth type of gendered relations may be called 'structuralist' as well for the sake of congruence with the notion of the 'structuralist social contract' and the 'symbolic order', contributions to this area of debate from the French academic and political arena discussed later in this chapter. Comparing the notion of sexes and generations as the grid of kinship, the cultural ideal this notion represents can be mapped on the following schema.

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<sup>33</sup> *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II.

<sup>34</sup> *X, Y and Z v. the United Kingdom*, para 36.

The order of family life in the case law of the European Court rests on the convergence of four types of relations between family members: biological (genetic), legal (State-recognised), social (lived-out) and gendered (sexed) relations.<sup>35</sup>

The typology described above is not supposed to be interpreted as a normative structure; it is meant to reflect the importance given in evaluating and balancing different forms of relations in the cultural ideal of the symbolic order in arenas where it has been potentially applied, such as the *Pacs* debate in France or the case law of the ECHR. The ideal of gender and generation is firmly rooted in the idea of the mutual complementarity of the female and male sexes not just in procreation, but in the constitution of society and the human mind itself. It does not merely indicate that a child should have two parents but that they should be of opposite sexes; this principle can be found in much social-psychological and psychoanalytic theory as well as in various religious doctrines. The model described above incorporates this assumption of opposite-sex parenting, and is emphasised greatly in contemporary debates such as the French *Pacs* and same-sex marriage debates. This is why many situations where social and official relations converge, such as extra-familial adoption and family formation with the help of donated eggs or sperm, are seen as complying with the symbolic order because they pay a resemblance to ‘natural facts’.

### 3.3 SELECTION OF DATA AND ANALYTICAL APPROACH

*The imposition of form produces the illusion of systematicity and, by virtue of this and the break between specialized and ordinary language which brings it about, it produces the illusion of the autonomy of the system.*

Pierre Bourdieu (1991: 141-2)

The texts analysed in this study make up a corpus of two different categories of documents from the electronic archives the European Court of Human Rights, judgements and decisions. In a couple of cases, reports have replaced decisions or have been analysed in addition to judgements<sup>36</sup>. Judgements are the primary data described and analysed in this study, due to their legal relevance as often they have been landmark cases and also because all judgements of the European Court of Human Rights have been published in

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<sup>35</sup> See also Hart 2009, where a visual version of this schema has been presented.

<sup>36</sup> This has been if a judgment or decision has not been issued (see *W. v. the United Kingdom*) but the complaint has included qualitatively interesting information or when a report from the Commission has added substantial information to the case (*Marckx v. Belgium*, report of the Commission).

full in the Hudoc online database<sup>37</sup>. Decisions, which have all been published since 1987, are secondary data, shedding light on the epistemic boundaries and shifts concerning what kind of applications have been deemed relevant for full Court proceedings in different decades. From an extra-legal, sociological and narrative point of view, both types of documents may contain data that is relevant for the purposes of this study. Other types of documents exist in the system of the ECHR, too, but judgements and decisions are the ones that provide a description of an application from its statement of facts to the outcome of the application, be it a decision of inadmissibility (not legally relevant for court procedure) or a judgement (regardless of the outcome of the case, the application presents a case that is relevant to the interpretation of the European Convention). Furthermore, there are “friendly settlements” when the application has been settled without court proceedings, and sometimes cases are “struck off the list” of pending cases if a solution has been reached between the applicant and the State in question.

The judgements and decisions analysed in this study have been selected from the electronic database of the European Court of Human Rights, Hudoc. The primary data, judgements that concern the establishment of family relations date from 1979 (*Marckx v. Belgium*) to 2014 (*Hämäläinen v. Finland*). Hudoc does not contain judgements from before 1979 which would have been relevant from the point of view of this study, the recognition of interpersonal family relations. The year 2014 is the last year from which cases have been taken up for analysis in this study, bringing forth relevant cases concerning surrogacy (*Mennesson v. France*, *Labassee v. France*) and marriage (*Hämäläinen v. Finland*). Thus, the selection of the case law has first proceeded on the basis of subjective evaluation by the author, and secondly on the need to draw a time limit in order to define and delimit the scope of a study that is also historical in nature. For identifying relevant texts from the *Hudoc* database, I have done a technical pre-selection of all judgements and decisions with the *Hudoc* keyword (according to the indexation available in the search tool of the database) Article 12 (right to marry) or Article 8 and “family life”, leaving out case law under Article 8 that was not indexed with the keyword “family life”. This amounts to 1,479 judgements and decisions (listed as “in English) from 1963<sup>38</sup> up until 31 December 2014<sup>39</sup>.

The availability of case law in the Hudoc database is as follows: all judgements from 1959 onwards are available. The “key cases” or pairs of cases that I discuss as the main substantive and illustrative examples of the themes in this study are all judgements. All decisions, either by the full-time Court or the part-time Commission of Human Rights (a former screening body) from 1986 onwards are also available on Hudoc. Some of the admissibility decisions

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<sup>37</sup> Available at <http://hudoc.echr.coe.int>.

<sup>38</sup> The first potentially relevant case thus being *X. v. Belgium*, no. 1488/62, Commission decision of 18 December 1963.

<sup>39</sup> As on the *Hudoc* database on 9th April 2015.

between 1955 and 1986 are available on Hudoc, as noted by the European Court in 2013:

*Availability of case law on Hudoc database*

| ECHR body         | Document type             | Time period | Availability |
|-------------------|---------------------------|-------------|--------------|
| <i>Commission</i> | Admissibility decisions   | 1955–1986   | Some d's*    |
| <i>Commission</i> | Admissibility decisions   | 1986–1998   | All          |
| <i>Court</i>      | Screening panel decisions | 1959–10/98  | All          |
| <i>Court</i>      | Admissibility decisions   | 11/98 →     | All          |
| <i>Court</i>      | Judgments                 | 1959 →      | All          |

\* Some published decisions

Source: Hudoc User Manual (2013)

More documents are added to the Hudoc database continuously, but from the point of view of this study, early decisions missing from Hudoc would probably not offer any vitally important information. Thus, in this study judgements act as primary data and decisions as secondary data, and inadmissibility decisions from before 1987 (less than 10) act as historical examples of inadmissibility decisions that have been made public between 1959 and 1987 (European Court of Human Rights 2009).

The European Court of Human Rights began functioning in 1959. For a long time, it was an institution which operated on a part-time basis and convened for a few days per month. A body called the “Commission of Human Rights” delivered admissibility decisions and acted as a screening body for the European Court. In 1998 Protocol 11 came into force and the previous two-tier was replaced with a full-time Court. Since 1998 applicants have been able to address their cases directly to the European Court. All in all, only 122 judgements and decisions published in the series “Reports of judgements and decisions” were given between 1959 and 1986. After that, over 9,600 judgements and published decisions were given between 1987 and 2008 (European Court of Human Rights 2009). In turn, according to the Hudoc database, between 2008 and 2014 over 17,300 judgements and decisions were given by the European Court of Human Rights.<sup>40</sup> As noted by Johnson, the European Court deems about 90 per cent of the applications it receives as inadmissible, so judgements are given and inadmissibility decisions are published only on a small number of complaints (Johnson 2013: 14, see also Dembour 2006: 23) regarding the huge number of applications the European Court processes nowadays.

In this study, a judgement or decision has been classified as relevant if the facts of the case (paragraphs under the heading “The Facts” in the beginning of each document) have displayed a dispute concerning the establishment

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<sup>40</sup> According to a Hudoc search 10 April 2015.

and/or the recognition of a parent-child relation or an intimate and enduring relation between two adults. Thus they touch upon the establishment of existing or potential family relations, those being relations of marriage, cohabitation and parent-child relationships in regular births, assisted reproduction and adoption. Cases dealing with custody and/or right of access between parents and children or cases involving the protection of family life in the context of immigration deportation issues have been left out, as the disputes in these kinds of cases do not, to an extent significant to this study, involve the existence or the recognition of a family relation – rather, the protection of an existing relation is under jeopardy. Likewise, cases concerning taking children into public care fall outside the ambit of this study as the issue at stake is not the existence of a recognised relation but rather State interference in the maintenance of these relations. Cases concerning the existing or potential family life of convicted prisoners have also been left out in order to focus more clearly on everyday settings and households.

The case texts can be divided into two parts: first come the facts of the case, which, depending on the case, unravels as a brief summary of details relevant to the case or as a life-history type of narrative. Second comes the description of the course of the case in the legal system of the respondent State and in the European Court. This is followed by an examination of the legal problems in the case and the decision given by the European Court of Human Rights. To a certain extent, the life-history and the legal narrative are intertwined. My analysis proceeds from describing the context of the life history to the legal dissection of the relations argued for or against. With the help of the conceptual tools described above, the question of what kinds of relations count in different cases and contexts is evaluated. Each thematic section focuses first on a key case or a pair of cases that are most relevant to the theme at hand. After that, other cases or inadmissibility decisions are discussed to enrich the description and analysis of that thematic category.

The aim of the selection process has been to highlight complaints with sociological and anthropological relevance. The relevance of a single complaint or case in such matters goes before quantitative appreciation of a mass of identical complaints. For example, cases concerning the recognition or rejection of maternity such as *Marckx v. Belgium* (1979) or *Odièvre v. France* (2003) are few in numbers but high in relevance and importance and lengthy when it comes to the page-count of these documents. In turn, cases concerning paternity are high in numbers but very often similar to each other. A chronological analysis is not to indicate that an evolutionary line can be drawn to show that the case law of the European Court is proceeding towards a self-evidently more enlightened view. Rather, the aim is to highlight shifting epistemic contexts which make different considerations relevant and pertinent at a given time. The data selected for this study has been grouped under the classical anthropological rubrics of alliance, consanguinity and filiation (see Chapter 1.1), which help in setting individual decisions and judgements into a wider context, which has also influenced the analysis of the texts themselves:

“Alliance” refers to adult couples, marriage and cohabitation; “Consanguinity” to the making and breaking of biological maternity and paternity; “Filiation” refers to the making of parent-child relations through the legal and medical techniques of adoption and assisted reproduction. A particular case might be discussed in more than one thematic category or chapter. The relational substance in the cases is analysed with the help of the notion of biological, legal, social and gendered relations (see previous sub-chapter) in order to evaluate the importance of one or more types of relations in particular contexts.

In addition to thematic classification and an analysis of the significance of biological, legal, social and gendered relations in each case, attention is given to the linguistic guise of these relations in the documents and the language applied by the European Court and the imposition of a formalised language of the European Court of Human Rights for turning life narratives into legal fact. This approach draws from Pierre Bourdieu and his writings on specialised languages and how they hold up power relations (1991) and on Jennifer Nedelsky’s ideas concerning relational analysis of legal disputes (2011, 2012). On a larger, sociological scale this study is inspired by Bourdieu’s thinking on the role of language in producing and maintaining symbolic power and the role of specialised languages in this task (1991: 137-159). Kirsten Hastrup, a Danish anthropologist, argues that relying on this notion from Bourdieu on the imposition of form that “...because human rights are cast in the genre of legal language, they rely heavily on their form for authority. Their nature is form and, along with other genres that depend on form, the law also legitimately exercises a violence of the freedom of interpretation” (2003: 24).

Jennifer Nedelsky provides carefully thought out approach focusing on relationality in legal theory in her magnum opus so far, *Law’s Relations* (2011). In the context of law and politics, relational analysis and methodology according to Nedelsky should focus on what kind of relations rights create, not just between people on an inter-individual scale, but between individuals, groups and institutions:

*Rights structure relations of power, trust, responsibility and care. This is as true of property and contract rights as it is of rights created under family law. All claims of rights involve interpretations and contestation. My argument is that these inevitable debates are best carried on in the following relational terms. First, one should ask how existing laws and rights have helped to construct the problem being addressed. What patterns and structures of relations have shaped it, and how has law helped shape those relations? The next questions are what values are at stake in the problem and what kinds of relations promote such values. In particular, what kind of shift in the existing relations would enhance rather than undermine the values at stake? There may, of course, be more than one value at stake, and they may compare with one another. For example, the relations that enhance the freedom and autonomy of the renter may decrease the security and*

*freedom of the landlord. What interpretation or change in the existing law would help restructure the relations in the ways that would promote a given value?*

*Jennifer Nedelsky (2011: 74)*

Thus, as Nedelsky points out following this paragraph, a distinction between rights and values is made. According to her, rights may be characterised as rhetorical and institutional devices for promoting values that are held dear, such as autonomy or equality (2011: 74). In the context of this study, Nedelsky's framework may be put to work in the following way: what kinds of relations between individuals (such as a dyadic intimacy between adults or a parent-child relation) or between an individual and the State (e.g. questions of status and recognition, such as married or not, legal parent or not) exist in the case at hand and how has existing domestic law influenced the setting in the case text? What is the relation argued for in the case like, how does it lack legal recognition and what kinds of values are argued to be secured if the relation in question is recognised?

In a later and much shorter text (Nedelsky 2012) based on the thinking and approach developed in *Law's Relations*, Nedelsky offers a bullet-pointed version of the questions which she describes as her "relational approach":

- 1. How did existing definitions of rights generate the conflict or debate at hand?*
- 2. What values are at stake in the particular conflict, for example, autonomy, political freedom, equality?*
- 3. What structures of relations foster those values; in particular, is there a shift in the existing structure that will better foster the value at stake?*
- 4. Which approach to the right in question will best (or better) foster that structure of relations?*

*Jennifer Nedelsky (2012: 235)*

These questions act as an inspiration to the relational analysis undertaken in this study. What is important is how "existing definitions of rights" frame and posit the relations of the applicant to the European Court vis-à-vis her family members, or the gendered interpersonal relations in question in the case at hand, as well as to the State in question and to the prevailing definition of 'family' as an institution, bundle of relations and an object of protection in family law and human rights law. In my data, the core value discussed is usually equality, sometimes autonomy, and often the degree of autonomy that is given to individuals in defining their family relations. What then is sought both by the European Court and the counterpoints and critique in the discussion relates to the two last questions, seeking a way of re-structuring the



interpersonal relations in the case vis-à-vis the State in order to better foster the value or values discussed in the case.

In the process of writing, guidance has been taken from Wendy Brown's notion of 'counterpoint' as a technique of critique and a style of writing (Brown 2002). In essence, it helps in entering into debate with the case text at hand, the notions expressed in it and the normative content it conveys. The exercise at hand is not really to argue 'against' the text but to open up different perspectives and what various audiences of the text may draw from it, be they familists, feminists or something else. According to Brown:

*Counterpoint, whether in music, painting, or verbal argument, is more complex and productive than simple opposition and does not carry the mythological or methodological valence of dialectics. Counterpoint is a deliberate art, at once open ended and tactical, that emanates from an antihegemonic sensibility and requires at least a modest embrace of spectral multiplicity to be comprehended. Counterpoint involves, first, the complicating of a single or dominant theme through the addition of contrasting themes or forces; it undoes a monolithic element through the multiplication of elements. Second, counterpoint sets off or articulates a thematic by means of contrast or juxtaposition; it highlights dominance through a kind of reverse othering.*

Wendy Brown (2002: 568)

Brown argues in favour of counterpoint as a resource for "renewing political theory's political concerns, renovating its identity, and developing its capacity to intervene in the restructuring of intellectual life" (2002: 568). Counterpoint, then, acts as a form of critique, an academic practice of reading and writing that aims at clarifying what a text and the person or institution behind it is trying to argue and establish. As Brown and Janet Halley (2002) have noted elsewhere, critique is a scholarly practice that may be accused of elitism and weak effects on quotidian injustice and political struggles, but it is still a vitally important exercise for questioning consensus and underlying assumptions of sets of thought or political and legal projects.

For example, Anastasia Vakulenko has taken up Brown's view of counterpoint as a technique of criticism and writing and sees that

*...counterpoint provides a technique for critical analysis, which does not insist on the correctness of its approach. Rather, it presents a set of observations in counterpoint to other arguments advanced on the subject. It thus offers perspective, rather than objectivity or comprehensiveness.*

Anastasia Vakulenko (2012: 8)

As a sociological study of legal documents and debates surrounding them, this is what this study aims to do as well: rather than just offer a critical reading

and simplistic answers to the questions posed from a certain point of view, this study aims to enrich and complexify the discussion of the questions at hand. Paying attention to national and historical context, the extra-legal dimensions of the case texts such as sociological or anthropological debates behind them or the expert knowledge referred to hopefully help both the author and the reader to form an informed and balanced view of the complex issues discussed in the case texts.

### **3.4 DISCUSSION: TYPES OF FAMILY RELATIONS IN THE ECHR**

*As political theorists, we do not need to develop original theories of rhetoric, semiotics, or interpretation, but to be effective readers of texts – events, canonical works, or historical developments – and to be as rigorous and self-reflexive as possible in the construction of our own arguments, we need to consult the fields that do make these studies, especially literary, rhetorical, and visual theory.*

*Wendy Brown (2002: 572)*

The European Convention provides a set of human rights principles that have been interpreted in a vast number of cases since the European Court of Human Rights began functioning sixty years ago. A considerable number of that case law concerns the protection of private and family life, spheres of human rights protection that are closely intertwined but at times sharply contrasted: “family life” is a privileged sphere within the larger realm of private life, and even though, due to the accumulation of case law and change in epistemic contexts on the European level, it has become more inclusive, it is still mainly held up by the perceived need to protect also the institutions of heterosexual marriage and gender-specific parental roles. However, certain change has taken place during the past decade, as same-sex couples are seen to share *de facto* family life according to the reasoning of the European Court in *Schalk and Kopf v. Austria* from 2010.

Despite the institutionalisation of human rights in international politics and their highly formalised and juridical character in supranational institutions, I argue, following Dembour (2006, 2010) that even when highly formalised and processualised, human rights are primarily a discursive category, words that make things happen. In *Who Believes in Human Rights?* Dembour (2006) offers a formidable theoretical and analytical account of the case law of the European Court of Human Rights. She analyses selected ECHR case law from realist, utilitarian, Marxist, particularist and feminist perspectives, and shows that besides administrative efficiency and the sanctioning of States Parties in their human rights commitments, the institutionalisation and proceduralisation of human rights can have adverse effects, too. Those who can afford the material and personal costs of seeking

justice from a supranational court tend to be the ones who benefit from its existence. (Dembour 2006: 254-255, see also Dembour 2010: 11.)

The European Court itself offers a wide variety of definitions and tools for analysing its case law (see Johnson 2013: 69-88). In many ways, it has created a specific genre of legal texts and a language of its own in order to 'standardise' the applications it receives, which are often, of course, already written in this language by lawyers and interest groups backing the individuals acting as applicants. The application of human rights principle to disputes between individuals and States may be evaluated with the help of a vocabulary derived from the European Convention, a learned skill possessed by those versed in ECHR case law. These texts are then studied in a variety of contexts: by (law) students in classes on human rights law in universities, by practicing lawyers in working for national Governments and in the private sector, by scholars for the sake of research, by activists in strategic litigation organised by NGOs and so on. Only a certain set of the facts of each case are displayed in the documents, but they suffice for this study to provide legal narratives that shed light on the variety of situations and contexts upon which the notion of what 'family' means in European human rights jurisprudence is built.

The data selected for this study from the vast case law of the European Court of Human Rights provides a corpus of legal narratives that offer the possibility to analyse how and under what circumstances formally recognised family relations come into being in European human rights jurisprudence. The typology of biological, legal, social and gendered relations acts as a conceptual framework for dissecting and discussing what is seen as relevant and important in deeming whether an intimate relation between two adults or a parent-child relationship is seen as worthy of State recognition and protection. If the principle of positive duties of the State to promote human rights in the realm of family life is taken seriously and dynamically, States are then obliged not just to recognise but also to accommodate for different types of supportive, nurturing and affective relations. This is where the essence of "relational subjects" comes in: due to a high degree of self-definition of identities and relations, recognition for a variety of close personal relations is sought. Often these judgements and decisions involve same-sex couples and/or transgender persons, as it is their situation and incompatibility with a rigid conceptual and normative grid of genders and generations that produces the legal disputes and claims ruled upon in ECHR case law.

The empirical analysis in the following chapters (4, 5 and 6) will proceed as follows: first, the content of relevant cases will be described, focusing on the facts of the case, which Convention rights were evoked and what was the outcome in the European Court. The description of case material will, in each sub-chapter, focus on a key case, a pair of key cases or a thematic succession of relevant case law. Specific attention will be given to definition of family life and family relations given by domestic Courts from the respondent State, the applicants and the European Court as well as extra-legal expert knowledge cited in case texts. Attention will be given to the production of ECHR case law

from the point of view of the imposition of form, i.e. dressing the legal narrative in question under the formulaic language of the European Convention on Human Rights. The substantive analysis of the issue at stake will be analysed with the help of Nedelsky's questions (2012: 235) on the possible restructuring of relations through rights in order to protect core values, but judging what might be the core value(s) at stake might not be a straightforward question. The analysis in each sub-chapter and chapter is written out striving to offer pertinent counterpoints and critique to the empirical and normative issues at hand.

## 4 ALLIANCE: MARRIAGE, CIVIL UNIONS AND COHABITATION

*Just as the State has left religion to the believers, it is asked nowadays to leave conjugality to individuals.<sup>1</sup>*

*Irène Théry (1993: 16)*

Which comes first in constituting a family, a (sexual) relationship between two adults<sup>2</sup> or the dyad made up by a woman giving birth and her child, like in the case of *Marckx v. Belgium*<sup>3</sup>? Conventional wisdom would tell us that courtship, engagement, marriage and a honeymoon come first in this order, children arrive sometime after the nuptials or later. When not constrained by convention, this chain of events might be made up of getting to know each other, dating, moving in together, having children and possibly getting married or concluding a civil union somewhere along the way, or some of these elements in a different order. These are descriptions of how the constitution of a socially and legally recognised form of couplehood often goes in the European context. However, the question posed in the opening of this paragraph is not really about the temporal chain of events in the constitution of family life. The question is about how a couple relationship (adult-adult) and a parental relationship (adult-child) relate to each other when the presence of legally relevant family relations is being evaluated. Alliance, as an anthropological term, refers to the act of forming a socially recognised union between two individuals, most often a woman and a man, which also leads to connecting two kin groups. The universal but culturally variable principle of incest prohibition produces the rule of exogamy, which means that one needs to find a spouse who is not too closely (see discussion in Chapter 1.1). The rules on who is too closely related and who is not has varied from one society and era to another as we will soon see in Chapter 4.1.

An analysis of the constitution of family relations in any legal culture would not be sufficient without at least a brief *parcours* through the meaning and significance of established forms of alliance. This chapter aims to do that by analysing relevant case law from the European Court of Human Rights regarding the process of the privatisation of marriage and similar relationships in Western States during the latter half of the twentieth century, or *démariage* (Théry 1993). The term comes from Irène Théry and her book *Démariage: Justice et la vie privée* (1993), where she performed an analysis of the change

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<sup>1</sup> “De même que l’État a abandonné la religion aux religieux, il lui est demandé aujourd’hui d’abandonner la conjugalité aux individus” (Théry 1993: 16). Translation by the author.

<sup>2</sup> The examination of intimate relations between adults in this study is restricted to couple relations: both polygamous and polyamorous relations have been left outside the scope of this study.

<sup>3</sup> Judgment of *Marckx v. Belgium*, 13 June 1979, Series A no. 31.

the institution of marriage has been going through in the French context during the latter half of the 20th century. The title does not merely refer to a "decline of marriage" as such, but to the increased privatisation of the arrangement of close relations within the realm of intimate relations and family formation. The importance of formal marriage and the requirements imposed by it might be 'in decline', but this is not directly linked to how people give value to morals or close relationships as such. *Démariage* may be translated as "de-marriage" or the undoing of marriage, and it captures nicely the decline of marriage as a strong social constraint on a collective, even though in certain social and cultural niches such as religious communities and on a personal level it might still be important to many people (see also Eekelaar 2006: 26 and Heaphy 2015: 118).

Thinking of current debates raging in the United States and Europe about the acceptability of same-sex marriage (see e.g. McClain and Cere 2013), is 'marriage' the same thing as, say, a century or so ago, when the notion coverture meant that wives were fully merged into the legal identities of their husbands and thus married women did not constitute legal subjects in their own right? (See Davies and Naffine 2001: 63.) As later chapters will demonstrate, the majority of families in the historical and geographical context of the ECHR are based on the union of a woman and a man of some if not life-long duration and the parties to this dyadic union are often the ones bearing the main responsibility for their offspring. However, how human reproduction works on the ground level is a different thing, and in many cases leading to legal disputes marriage merely provides a framework for trying to make sense of it all, sometimes failing miserably.

Judgements and decisions of the European Court of Human Rights that touch upon the intimisation of marriage as a state-sanctioned institution and describe the transformation of the role of a sexual relation between two adults as the basis of family life can be divided into four categories: 1) state intervention in the right to marry, 2) possibility of divorce, 3) transgender marriage and 4) forms of same-sex unions such as registered partnerships and same-sex marriage where it has been legislated. The first category discussed in this sub-chapter is of great anthropological import, as it deals with interventions in the right to marry. *B. and L. v. the United Kingdom* from 2005<sup>4</sup> is a reminder of remnants of complex rules of incest prohibition in European legal systems and how they collide with the abstract principles of human rights law in the European Convention and modern-day notions of individuality. Cases in the second category deal with the possibility of obtaining a divorce. The most notable cases in this respect, *Airey v. Ireland* from 1979<sup>5</sup> and *Johnston and others v. Ireland* from 1986<sup>6</sup> and a few of the other cases shed light on the fact that divorce has not been regarded as a

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<sup>4</sup> *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005.

<sup>5</sup> *Airey v. Ireland*, 9 October 1979, Series A no. 32.

<sup>6</sup> *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112.

human right as such, as for long it was not available all Member States of the Council of Europe.<sup>7</sup>

The third and the fourth categories deal with more or less recent legal developments in what could be termed the “de-gendering” of marriage<sup>8</sup>, and the possibility of transgender and non-heterosexual individuals to marry or to form civil unions. Both categories display a wealth of data. However, almost all of the cases dealing with the right to marry for transgender people come from the United Kingdom and were fairly similar in their argumentation and outcome before *Christine Goodwin v. United Kingdom* from 2002<sup>9</sup>, which established the right of post-operative transgender persons to obtain a legal identity in accordance with their reassigned gender identity and thus also the right to marry according to their reassigned gender. The theme of same-sex marriage was deliberated in *Schalk and Kopf v. Austria* from 2010<sup>10</sup>, in which the European Court offered modest support to the idea that same-sex couples share *de facto* family life, but that Article 12 of the European Convention could not be interpreted to mean that States had to offer same-sex marriage<sup>11</sup>. Furthermore, the Grand Chamber judgement of *Hämäläinen v. Finland* from 2014<sup>12</sup> illustrates the difference between the right to marry at a certain point in time and the right to remain married after gender recognition.

## 4.1 STATE INTERVENTION IN WHO ONE MAY MARRY

The key case under the rubric of state interference in the right to marry is the judgement of *B. and L. v. the United Kingdom* from 2005. The case report is quite short, but it offers a glimpse into the complicated history of English law on prohibited degrees of affinity and how the rules concerning the prohibited degrees of relationships spelt out as far back as in the Old Testament were transposed into secular law in England. Marriage prohibitions are also at the core of the anthropological study of kinship: who are seen as too close to mate and what is seen as beneficial to the community or society in question. Other

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<sup>7</sup> Malta was the last European State to legalise divorce in 2011 when a referendum on allowing divorce was held (“MPs in Catholic Malta pass historic law on divorce”, 25 July 2011, BBC online news item). The Republic of Ireland has allowed divorce after a referendum held in 1995. On the process in Ireland, see Burley and Regan (2002).

<sup>8</sup> The term “degendering marriage” has been thought up by many scholars, for example Barker (2012: 121) and Ball (2014: 136), but usually the term is used descriptively to sum up on a debate as a passing mention.

<sup>9</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

<sup>10</sup> *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

<sup>11</sup> A few cases (e.g. *Chapin and Charpentier v. France* (no. 40183/07), *Orlandi and Others v. Italy* (no. 26431/12)) are pending on the matter of same-sex marriage and will probably shed light on the definition of marriage in the ECHR in 2015 or later (European Court of Human Rights 2015a).

<sup>12</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014.

cases in the history of the ECHR that deal with State interference in the right to marry deal with other forms of prohibited relations, such as marriage between a stepfather and a stepdaughter<sup>13</sup>, a young man eloping with an underage girl<sup>14</sup> and the possibility, or rather the impossibility of contracting a posthumous marriage<sup>15</sup>. All of these complaints and cases deal with the kind of anthropological import present in *B. and L.* – who may marry who and according to rules laid down by whom, which are intertwined with communally held moral convictions that marrying a relative not just through consanguinity but through marriage, a child or a dead person is abhorred. Other complaints and cases in this category deal more with the interests of the State in posing obstacles to marriage: serving in the army creating restrictions on marrying<sup>16</sup>, or not regarding a certain form of marriage as valid, such as marriage celebrated through religious rituals<sup>17</sup> not recognised by the State or different rules regarding marriage for different ethnic groups<sup>18</sup>.

From an anthropological point of view, the judgement of *B. and L. v. the United Kingdom* is a prime example of the remnants of complicated incest prohibitions and marriage rules. In common parlance in Western countries, ‘incest’ tends to be understood to refer to prohibited sexual relationships between close relatives such as parents and children or between siblings. However, incest prohibitions are not just about forbidding sexual relations between people with a close blood relationship. As Adam Kuper (2002) points out, this is the meaning the word has today, and it is also associated closely with child abuse. Within anthropological scholarship and in the past the concept of incest has been wider. Anthropological scholarship studies rules of what is considered as incest or prohibited degrees of relationships and how these boundaries vary from one culture to another. For example, in England, the concept of incest used to encompass relations through marriage, which led to marriage prohibitions between not just blood relatives (due to consanguinity) but also between in-laws, due to understandings of what affinity is (Kuper 2002).

Stephen Cretney (2003), a British legal historian, offers a detailed history of the treatment of prohibited degrees of relationships in his account of the history of English family law. In English law, prohibitions to marry a relative through marriage, such as one’s sister-in-law or brother-in-law were not reformed in a single piece of legislation that would have made the situation symmetrical in terms of gender and degree of proximity. Instead, legislation

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<sup>13</sup> *Waser and Steiger v. Switzerland* (dec.), no. 31990/02, 23 October 2006.

<sup>14</sup> *Khan against the United Kingdom*, no. 11579/85, Commission decision of 7 July 1986.

<sup>15</sup> *M. v. Federal Republic of Germany*, no. 10995/84, Commission decision of 13 December 1984.

<sup>16</sup> *Dimitra Staiku v. Greece*, application no. 35426/97, Commission decision of 2 July 1997.

<sup>17</sup> *X against the Federal Republic of Germany*, no. 6167/73, Commission decision of 18 December 1974, Decision and reports XX, p. 64.

<sup>18</sup> *Selim v. Cyprus* (dec.), no. 47293/99, ECHR 2001-IX. See also *Selim v. Cyprus* (friendly settlement), no. 47293/99, ECHR 2002-VI.



was reformed in a piecemeal fashion, responding to individual cases and life histories, or large-scale historical events such as the First World War, after which many women and the brothers of their dead husbands wanted to marry. The history of prohibited degrees of marital relationships in English law is by no means clear or straightforward. Prohibitions on marrying the brother or sister of one's former spouse were lifted one by one over a long period lasting from the 19th century to the early 20th century, so symmetrical relationships such as marrying the sister of one's former wife for men or marrying the brother of one's former husband for women were not made possible at the same time. Personal Acts of Parliament were a way of getting around the restrictions, as mentioned in the case material of *B. and L.*, but this was a costly, complicated and a one-by-one solution to this issue. (Cretney 2003, see also Héritier 1993.)

*B. and L. v. the United Kingdom* was about a couple, an older man and a younger woman, who had been father-in-law and daughter-in-law – that is, L., the woman, had been married to B.'s son, C., and L. and C. had had a child together. After L., the woman, separated from her husband C., she and B., a divorcee, began cohabiting, and L.'s and C.'s child lived with them. Thus, the child was living with his mother and his grandfather, who also happened to be his 'stepfather'. In 2002, B. inquired from their local Superintendent Registrar whether B. and L. could marry. The Superintendent Registrar replied that under English law at the time, the Marriage Act 1949 as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, this was impossible unless B.'s ex-wife (C.'s mother), and C. (B.'s son and L.'s ex-husband), were both dead.<sup>19</sup> There was one possible way around the marriage prohibition, which was the Personal Bill procedure available in the Parliament. Over the years, some couples with a similar degree of affinity had succeeded in obtaining the possibility to marry through a personal petition in the form of a "personal legislative project" made to the Parliament.<sup>20</sup> However, in order to succeed one needed to know about the procedure and devote both time and money to it.

When complaining to the European Court, B. and L. invoked Article 12 of the European Convention, and no other rights stipulated in the Convention. They argued that the prohibition in place "denied them the very essence of the right to marry"<sup>21</sup> and that the restriction was "disproportionate and unjustified"<sup>22</sup>. They also pointed out that Personal Acts that had been passed for other couples undermined the importance of the prohibition. Furthermore, they argued that:

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<sup>19</sup> *B. and L. v. the United Kingdom*, paras 7-12.

<sup>20</sup> Personal bills mentioned in *B. and L. v. the United Kingdom* are the *Valerie Mary Hill and Alan Monk (Marriage Enabling) Act 1985* (para 21) and *Sonia Ann Billington and Norbury Billington (Marriage Enabling) Bill 1985* (para 23).

<sup>21</sup> *B. and L. v. the United Kingdom*, para 28.

<sup>22</sup> *B. and L. v. the United Kingdom*, para 28.

*... the majority in the report before the House of Lords were in favour of lifting the restriction as serving no purpose. Even the minority were more concerned about the relationship of step-father and step-daughter, in which respect the prohibition was in the end removed. There were, in the applicants' view, no sensible or coherent distinctions between their situation and that of other categories which were permitted (step-father and step-child, brother-in-law and sister-in-law etc.).*

B. and L. V. the United Kingdom, para 29

Regarding the position of L.'s and C.'s son, they argued that he actively supported B.'s and L.'s plans to marry and "wanted to be part of a 'normal' family"<sup>23</sup>. The Government defended the legislation in place due to the "complexity or relationships"<sup>24</sup> in question, potential harm to third parties and the protection of morals. Regarding L.'s and C.'s child, the situation could be "deeply confusing and disturbing"<sup>25</sup>. The Government maintained that the restriction could be defended as part of the national legislation that Article 12 very much refers back to and necessary "...given the risk of such marriages undermining the foundations of the family and altering relationships between affines; public views on the moral limits of permissible relationships within the family and the risk of public outrage; and the role of law in defining and reinforcing family relationships"<sup>26</sup>.

The European Court elaborated that the English legislation in question "aimed at protecting the integrity of the family (preventing sexual rivalry between parents and children) and preventing harm to children who may be affected by the changing relationships of the adults around them"<sup>27</sup> and deemed these to be legitimate aims. It noted that there was no legislation in place to deter parents-in-law and children-in-law from having sexual relations together and such relationships did sometimes take place as the case at hand demonstrated. In addition, as it was legally possible to contract such marriages with the help of the Personal Bill procedure, the European Court reasoned that there was no categorical ban of marriages such as B.'s and L.'s proposed marriage. According to the European Court "[t]he inconsistency between the stated aims of the incapacity and the waiver applied in some cases undermines the rationality and logic of the measure"<sup>28</sup>. Thus, the European Court ruled that there had been a violation of Article 12 of the European Convention.

So, what were these restrictions based on? To go far back, the Old Testament, more specifically Leviticus 18: 6-18. The old Judaic rules

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<sup>23</sup> B. and L. v. the United Kingdom, para 29.

<sup>24</sup> B. and L. v. the United Kingdom, para 31.

<sup>25</sup> B. and L. v. the United Kingdom, para 31.

<sup>26</sup> B. and L. v. the United Kingdom, para 32.

<sup>27</sup> B. and L. v. the United Kingdom, para 37.

<sup>28</sup> B. and L. v. the United Kingdom, para 40.

prohibited sexual relations with certain categories of both consanguineous relatives<sup>29</sup> and affines<sup>30</sup>. Verses 6-13 prohibit relations with mainly consanguineous female relatives in relation to a male Ego: mother, step-mother (father's wife), sister, half-sister, niece and aunt. In verses 14-18, the prohibitions deal with relatives through marriage:

*14 Do not dishonor your father's brother by approaching his wife to have sexual relations; she is your aunt.*

*15 Do not have sexual relations with your daughter-in-law. She is your son's wife; do not have relations with her.*

*16 Do not have sexual relations with your brother's wife; that would dishonor your brother.*

*17 Do not have sexual relations with both a woman and her daughter. Do not have sexual relations with either her son's daughter or her daughter's daughter; they are her close relatives. That is wickedness.*

*18 Do not take your wife's sister as a rival wife and have sexual relations with her while your wife is living.*

*New Living Bible 2007, Leviticus 18: 6-18*

In the Catholic Church these verses gave rise to a complex system of marriage prohibitions, but they could be overcome by dispensation from the Pope. In England, the content of these verses were worked into a table of prohibited degrees of relationships, known as 'Archbishop Parker's Table', which was adopted in the Canons of the Church of England in 1603 and included in the Book of Common Prayer in 1662. So, even after Reformation English law prohibited certain potential marriages according to rules spelt out in Leviticus, and in contrast to mediaeval canon law of affinity offered no dispensation. (Bennett 1998: 668.) However, these rules were formally situated in ecclesiastical law. They were engrained in secular legislation in 1835, when Lord Lyndhurst's Act turned them into effective legislation (Cretney 2003: 39, see also Héritier 1993: 125-138).

From the point of view of the right to marry as a right guaranteed by the European Convention, *B. and L.* is a highly interesting case from the point of view of anthropological scholarship, as it displays a question where a complex bundle of incest prohibitions that have travelled from one culture and era to another and human rights principles, yardsticks of ethical principles specified in our culture and era, come together. Héritier (1993), who has analysed a variety of historical traditions related to the question of incest of the second degree, meaning prohibited degrees of relationships not on the basis of genetic

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<sup>29</sup> I.e. blood relatives.

<sup>30</sup> I.e. relatives through marriage or "in-laws".

relatedness but of ties created by marriage; offers a general framework of the avoidance of contact between blood relatives through the same sexual partner, which applies to *B. and L.* as well. However, she also points out the question of maintaining social order and hierarchies between male head of a kin group through the avoidance of sexual rivalry between brothers, fathers and sons and so on (see 1993: 20).

From the perspective of normativity, it is a key judgement as it sets doctrine emanating from religious authority such as biblical rules and canon law in opposition with human rights doctrine. What was at some point regarded as necessary for order and stability in society is seen as irrational, backward, and standing for “no just cause” as noted in a committee report on the possibility of lifting these prohibitions in the United Kingdom in the 1980s (Report by Group... 1984). However, the juxtaposition of tradition and religiously inspired norms of prohibited degrees of affinity against human rights law in this manner is not this self-evident. What is most interesting in *B. and L.* is how ancient Judeo-Christian incest prohibitions are juxtaposed with modernity and the idea of individual human rights. The judgement led to the lifting of such marriage prohibitions with the Marriage Act 1949 (Remedial) Order 2006. In conjunction with the preparation of this Act, opposition was still voiced by some Christian communities, and also after 2006 priests are exempt from marrying couples within the former prohibited degrees of affinity with the help of a conscience clause. (Draft Marriage Act 1949 [Remedial] Order 2006.)

*B. and L.* is not the only complaint made to the European Court of Human Rights concerning marriage prohibitions between affines. In *Waser and Steiger against Switzerland* from 2006<sup>31</sup> a couple composed of a man and a woman who was the daughter of the man’s former wife sought to marry after living together and having children. Interestingly, the arguments put forward by the Federal Tribunal, the highest court where the complaint was made before reaching the European Court, stressed “peace within the family” as the rationale behind the law:

*The federal Tribunal concluded that the prohibition was absolute and its ratio legis (legal rationale) was the maintenance of peaceful relations within the family. In addition, the federal Tribunal judged that such a marriage would have been destabilising for the immediate family, especially to the parent of the child finding him or herself in this situation as well as for his/her brothers and sisters.*<sup>32</sup>

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<sup>31</sup> *Waser and Steiger against Switzerland*, 31990/02, decision of 23 October 2006.

<sup>32</sup>. Original quote: “Le Tribunal fédéral en conclut que l’interdiction était absolue et sa *ratio legis* était le maintien de la paix familiale. Au surplus, le Tribunal fédéral jugea qu’un tel mariage eût été déstabilisant pour la famille proche, notamment le parent de l’enfant se trouvant dans cette situation ainsi que ses frères et sœurs”. *Waser and Steiger against Switzerland*, “En fait”, available only in French. Translation by the author.

The applicants lodged their complaint to the European Court in 2002, but the Swiss government and the applicants reached a friendly settlement as marriage prohibitions between affines were suppressed when Switzerland adopted legislation for registered partnerships for same-sex couples in 2005<sup>33</sup>. Thus, unlike in the United Kingdom, enacting separate partnership legislation led to suppressing the remnants of affinity-based marriage prohibitions. In United Kingdom, they have been suppressed as well in 2007 (Draft Marriage Act 1949 [Remedial] Order 2006), but after approving civil partnership legislation that entered into force in 2004.

Other decisions and judgements involving state intervention in the right to marry are to do with other prohibitions, such as age, retroactivity and mental incapacity, or the interests of the State and other institutions and the powers of the State in delegating the right to contract marriages to religious communities. In *Khan against the United Kingdom* (1986)<sup>34</sup> a 21-year-old man had run away with a 14-year-old girl. The couple had sought permission from the father of the girl to marry, but due to his refusal they ran away and held an Islamic marriage ceremony. They lived together for over a year before the father of the girl took her away. The young man was charged with abducting the girl “from the possession of the father”<sup>35</sup> and having sex with a girl under 16 years of age, both breaches of the Sexual Offences Act 1956. The young man received a prison sentence of nine months. To the European Court, he evoked Articles 9, 12 and 14 and complained that the Sexual Offences Act interfered with his possibility of “manifesting his religion through his marriage under Islamic law”<sup>36</sup>, “prevented him [from] consummating his marriage and founding a family”<sup>37</sup> and that he was “discriminated against in that the judge failed to take into consideration his religion, under which it is considered lawful for a girl to marry on attaining the age of 12 years without her parents’ consent”<sup>38</sup>. The European Court considered his complaint inadmissible.

A somewhat similar case was *X. against the Federal Republic of Germany* from 1974. In this complaint, the applicant and Mrs Y had considered themselves to be married after having intercourse after “having read out verse 16 of the 22nd chapter of the second book of Moses in the Old Testament”<sup>39</sup>. The complaint was deemed manifestly ill-founded and inadmissible, as the Commission considered that “[m]arriage is not considered simply as a form of

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<sup>33</sup> Waser and Steiger against Switzerland, “*En Droit*”.

<sup>34</sup> *Khan v. the United Kingdom*, no. 11579/85, Commission decision of 7 July 1986.

<sup>35</sup> *Khan v. the United Kingdom*, p. 254.

<sup>36</sup> *Khan v. the United Kingdom*, p. 254.

<sup>37</sup> *Khan v. the United Kingdom*, p. 254.

<sup>38</sup> *Khan v. the United Kingdom*, p. 254.

<sup>39</sup> *X v. the Federal Republic of Germany*, no. 6167/73, Commission decision of 18 December 1974, Decision and reports XX, p. 64.

expression of thought, conscience or religion but is governed by the specific provision of Article 12 which refers to the national laws governing the exercise of the right to marry”<sup>40</sup>. In contrast to *Khan*, no crime had taken place as supposedly the parties to the marriage rite were of marriageable age, but the role of the State in having the last word in what is to be considered a marriage despite of religious views and convictions is demonstrated in these two cases. In this vein, the State also draws the line in matters concerning who can perform marriages: in *Spetz and others against Sweden*<sup>41</sup> Pentecostal pastors of a certain congregation had their licenses for performing marriages revoked by the Swedish authorities due to supporting “breakaway movements” from the Pentecostal Church. In turn, in the case of *Selim v. Cyprus*<sup>42</sup> a Turkish Cypriot was not allowed to contract civil marriage with his Romanian fiancée. The problem was due to a clash of the Cypriot and Turkish legal systems on the island, and the situation was remedied with an Act applying to all of Cyprus allowing civil marriages before the European Court would have given a decision on the matter. However, it goes to show that limiting marriage to civil marriages, the domain of the State is not the only way to draw the line on what is considered a valid marriage.

In *M. against the Federal Republic of Germany*<sup>43</sup> the issue at stake was posthumous, retroactive marriage. A woman whose fiancé had disappeared in the Second World War in 1944 wanted to marry him retroactively, as she gave birth to their child during the same year he disappeared. The application was unsuccessful in her legal system, and indeed the Commission, too, considered that “men and women of marriageable age” excluded deceased persons. This may seem trivial, but at the same time it demonstrates in very tangible terms that marriage, by definition, is a union of two parties who may give their consent to it in person. In *De Francesco against Italy*<sup>44</sup> and *De Luca against Italy*<sup>45</sup> this same theme was approached from the perspective of mental incapacity in consenting to a marriage. For the applicants, De Francesco and De Luca, who were the couple who wanted to get married, the problem was that close family members of the fiancé opposed to the marriage due to alleged mental incapacity and being placed under wardship. However, in these cases the issue at stake was also the length of proceedings. However, the Commission declared the complaints inadmissible.

Corporations such as aristocratic families, may have more direct interests in trying to interfere in the right to marry. An example of such a corporation is given by *Zu Leiningen against Germany*<sup>46</sup> where the rights and privileges of

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<sup>40</sup> *X v. the Federal Republic of Germany* p. 65.

<sup>41</sup> *Spetz and others v. Sweden*, no. 20402/92, Commission decision of 12 October 1994.

<sup>42</sup> *Selim v. Cyprus* (friendly settlement), no. 47293/99, ECHR 2002-VI.

<sup>43</sup> *M. v. Federal Republic of Germany*, no. 10995/84, Commission decision of 13 December 1984.

<sup>44</sup> *Giuseppe de Francesco v. Italy*, no. 13741/88, Commission decision of 12 March 1990.

<sup>45</sup> *Giuseppa de Luca v. Italy*, no. 13823/88, Commission decision of 12 March 1990.

<sup>46</sup> *Zu Leiningen v. Germany* (dec.), no. 59624/00, ECHR 2005-XIII

members of nobility were tied to marrying according to family traditions, first stipulated in the Family Codes of aristocratic families, and after they were abolished, protected by testamentary freedoms. Thus, this affected a certain class of privileged people living today. The European Court did not have to decide the case as the complaint was withdrawn. In *Staiku against Greece*<sup>47</sup> the issue at stake was that joining the army affected the possibility of the applicant to marry. The applicant, a nurse by profession, joined the Greek armed forces in 1960. Seven years later she was dismissed as she had married within less than five years from joining the armed forces, which was against regulations. Her dismissal was later seen as having breached her fundamental rights and she was re-hired in the 1980s. After being re-hired she requested to be promoted to the rank she would have obtained if she had not been dismissed. It was this in her complaint that was deemed inadmissible by the Commission.

## 4.2 SEPARATION, DIVORCE AND REMARRIAGE

The key cases related to the possibility to obtain a divorce and remarry are two relatively old cases from the Republic of Ireland, *Airey v. Ireland* from 1979<sup>48</sup> and *Johnston and others v. Ireland* from 1986<sup>49</sup>. A constitutional ban on divorce was introduced in Ireland in 1937, and the ban was lifted in 1997 following a referendum on the matter in 1995 (Burley and Regan 2002). The judgements given in these cases did not grant a human right to divorce as such. From a contemporary perspective, it is indeed interesting that a human right to marry has been seen as a key civil and political right and can be read from e.g. the Universal Declaration of Human Rights (Article 16) and the European Convention (Article 12), but to this day a right to get out of a marriage has not been recognised.

In *Airey v. Ireland* Mrs. Airey, a married woman with four children and of a “humble family background”<sup>50</sup>, had tried to obtain a decree of judicial separation from her husband, who had been convicted of assaulting her. As divorce was not possible in Ireland at the time, a decree of judicial separation was the best option available for leading separate lives in the situation of marital breakdown. During her process in the European Court, she had applied for annulment of her marriage from an ecclesiastical tribunal as well.<sup>51</sup> Due to her financial situation, Mrs. Airey could not afford the High Court proceedings to obtain such a decree, and she did not get legal aid either, as it

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<sup>47</sup> *Staiku v. Greece*, no. 35426/97, Commission decision of 2 July 1997.

<sup>48</sup> *Airey v. Ireland*, no. 6289/73, 9 October 1979, Series A no. 32.

<sup>49</sup> *Johnston and others v. Ireland*, no. 9697/82, 18 December 1986, Series A no. 112.

<sup>50</sup> *Airey v. Ireland*, para 8.

<sup>51</sup> *Airey v. Ireland*, paras 8-9.

was not provided for judicial separation or other civil matters<sup>52</sup>. Thus, her right to try to obtain a decree of judicial separation due to physical and mental cruelty from her husband, one of the accepted grounds for judicial separation, was not realistic as she could not afford the proceedings.

The *Airey* case was technically most concerned with Article 6, the right to access to court, but Article 8 was evoked, too. A violation of both rights was found, so the lack of access to court for separation proceedings was seen as a right pertaining to private and family life even in the absence of divorce. The European Court argued in *Airey*:

*In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together. Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant : not having been put in a position in which she could apply to the High Court... she was unable to seek recognition in law of her de facto separation from her husband. She has therefore been the victim of a violation of Article 8...*

*Airey v. Republic of Ireland, para 33*

Dembour has hailed the *Airey* judgement as an early feminist victory in her analysis of case law of the European Court, as in her words, it is a rare example in the history of the ECHR where the European Court “used its legal imagination in order to relieve the predicament of a woman” (Dembour 2006: 215). The main point of the European Court was that rights guaranteed by the European Convention should not be “theoretical and illusory” but “practical and effective”<sup>53</sup>. Thus, it was not enough to deplore that Ms Airey could not afford Court proceedings, the system should be modified so that everyone regardless of their financial means have access to court also in civil matters. In essence, a right to divorce was not discussed as such, but the unavailability of a proceeding that helps in ending marital relationship was seen as a violation of the right to private and family life.

*Johnston and others v. Ireland* from 1986<sup>54</sup> is in some ways comparable to *Airey* from a male point of view, as it is relevant to the privatisation and intimisation of dyadic relationships between adults and the process of *démariage* (see Théry 1993). However, in this case the possibility to divorce and remarry and the possibility of a child born out of wedlock to be recognised

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<sup>52</sup> *Airey v. Ireland*, para 11.

<sup>53</sup> *Airey v. Ireland*, para 24.

<sup>54</sup> *Johnston and others v. Ireland*, no. 9697/82, 18 December 1986, Series A no. 112.



were deeply intertwined. The applicants were a cohabiting couple, Mr Johnston, Ms W and their child. Mr Johnston got married in 1952 and three children were born of the marriage. In 1965, Mr Johnston and his wife began to live in separate parts of the family home. Both of them formed relationships with other people with and lived with their partners in self-contained flats in the house until 1976, when Mrs Johnston moved away. Mr Johnston had been living with Ms W for seven years when they had a child in 1978. Mr and Mrs Johnston were unable to divorce under the Irish legislation in force at the time<sup>55</sup>, but Mr Johnston made arrangements to the benefit of Ms W and their daughter.<sup>56</sup>

In front of the Commission, Mr Johnston, Ms W and their child complained of the “absence of provision in Ireland for divorce and for recognition of family life of persons who, after the breakdown of marriage of one of them, are living in a family relationship outside marriage”<sup>57</sup>. They evoked Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 12 (right to marry and to found a family) and Article 13 (right to an effective remedy) of the European Convention as well as Article 14 (prohibition of discrimination) taken in conjunction with Article 8 and Article 12). In the end, the European Court only found a violation of Article 8 regarding “the legal situation of the third applicant under Irish law... as regards all three applicants”. It did not find a violation of Article 8 or Article 12 due to the inability of Mr Johnston and Ms W to marry.

In contrast to *Airey, Johnston* (discussed in chapter 5.3 also in the context of paternity out of wedlock) dwells very much on the absence of the right to divorce, or the resulting inability to remarry, and the argument was built on Article 8 and Article 12. In this case, the European Court found that the lack of recognition of the relationship Mr Johnston had with his child born out of wedlock but with a woman he was cohabiting with constituted a violation of Article 8, but the lack of recognition of the relationship between him and his cohabitee and their impossibility to marry due to him not being able to divorce his wife did not. The European Court offers an interesting discussion why no right to divorce may be understood to emanate from Article 12:

*The Court agrees with the Commission that the ordinary meaning of the words "right to marry" is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes an express reference to "national laws"; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be*

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<sup>55</sup> A constitutional ban on divorce was introduced in Ireland in 1937, and the ban was lifted in 1997 following one unsuccessful referendum and a successful one in 1995. See Burley and Regan (2002).

<sup>56</sup> This case is discussed also in Chapter 5.3 on paternity.

<sup>57</sup> *Johnston and others v. Ireland*, para 38.

*regarded as injuring the substance of the right guaranteed by Article 12...*

*Johnston and others v. Ireland, para 52*

The European Court went on to refer to the *travaux préparatoires* (preparatory works) of the European Convention and how Article 12 was based on Article 16(1) of the Universal Declaration of Human Rights which stipulates the right to marry and to found a family free from racial, nationality-based or religious discrimination if of full age. The drafting history of the European Convention was cited to note that the latter part of Article 16(1) of the UDHR stipulating that men and women “are entitled to equal rights as to marriage, during marriage and at its dissolution” was not included in Article 12 of the ECHR as only a right to marry was to be guaranteed.<sup>58</sup>

The decision of *Kubiszyn against Poland*<sup>59</sup> from 2003 is slightly related to *Airey* in the sense that it concerns a divorce proceeding intertwined with criminal proceedings due to marital violence. However, the issue at stake was not the unavailability of divorce as such, and the complaint had more to do with the applicant, the wife, alleging unfair treatment by the judiciary as well as the length of divorce proceedings. In turn, the decision of *J.G. against Ireland*<sup>60</sup> from 1987 was somewhat similar to *Johnston*, as the applicant desired to obtain a divorce due to leaving the Roman Catholic Church. The case was struck off the list due to the outcome of *Johnston*. The decision of *X against Switzerland* from 1981<sup>61</sup> concerned a slightly similar situation where an Argentinian national was unable to remarry in Switzerland due to having obtained only a judicial separation, not a divorce in his country of origin. This complaint, too, was considered inadmissible. Obstacles to marrying again after separating from one’s previous spouse have not surfaced in the European Court just from countries not granting divorce such as Ireland up until the mid-1990s. In the decision of *K.M. against the United Kingdom*<sup>62</sup> from 1997 the possibility of remarriage was affected by a divorce battle where the parties cross-petitioned each other and the process led to an error in the court system. In the judgement of *Berlin v. Luxembourg* from 2003<sup>63</sup> and the judgement of *Aresti Charalambous v. Cyprus* from 2007<sup>64</sup> the issue at stake was the length of divorce proceedings.

In the judgement of *F. against Switzerland*<sup>65</sup> from 1987 the applicant faced a temporary prohibition on remarriage imposed by the Swiss courts following

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<sup>58</sup> *Johnston and others v. Ireland*, para 52.

<sup>59</sup> *Kubiszyn v. Poland*, no. 37437/97, 30 January 2003.

<sup>60</sup> *J.G. v. Ireland*, no. 9584/81, 8 May 1987, struck off the list.

<sup>61</sup> *X. v. Switzerland* (dec.), no. 9057/80, 5 October 1981.

<sup>62</sup> *K.M. against the United Kingdom* (dec.), no. 30309/96, 9 April 1997.

<sup>63</sup> *Berlin v. Luxembourg*, no. 44978/98, 15 July 2003.

<sup>64</sup> *Aresti Charalambous v. Cyprus*, no. 43151/04, 19 July 2007.

<sup>65</sup> *F. v. Switzerland*, no. 11329/85, 18 December 1987, Series A no. 128.

his third divorce due to being the party at fault. Such a restriction was possible under the Swiss Civil Code under a provision that dated from 1912.<sup>66</sup> Such a waiting period had been a legal possibility in the Federal Republic of Germany, which abolished it in 1976, and in Austria that abolished it in 1983<sup>67</sup>. The reason provided in the narrative was that he got married to his third wife after a few days of acquaintance and filed for divorce less than two weeks after getting married to her. As setting a remarriage ban was possible in Swiss law, he was given a three-year ban on remarrying due to his behaviour towards his third wife. In front of the Commission, he complained that his rights under Articles 12 (right to marry and to found a family), 8 (right to respect for family life) and 3 (prohibition of degrading treatment) had been violated, of which the Commission found the complaint admissible under Article 12.<sup>68</sup> The European Court compared the situation of Mr F to the situation of Mr Johnston by arguing that

*...furthermore, and above all, F's situation is quite distinct from Mr. Johnston's, since what was at issue in the case of the latter was the right of a man who was still married to have his marriage dissolved. If national legislation allows divorce, which is not a requirement of the Convention, Article 12 (art. 12) secures for divorced persons the right to remarry without unreasonable restrictions.*

F. v. Switzerland, para 38

Thus, the European Court regarded the marriage ban disproportionate to the aim pursued, and found a violation of Article 12<sup>69</sup>. However, while noting that such waiting periods had been abolished in neighbouring States and that the Convention had to be interpreted according to present-day conditions, it also found that

*... the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field - matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.*

F. v. Switzerland, para 33

This would also mean that if a State would remain among few others that stick to a singularist notion of marriage, this would not, as such, pose a problem to

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<sup>66</sup> F. v. Switzerland, para 22.

<sup>67</sup> F. v. Switzerland, para 33.

<sup>68</sup> F. v. Switzerland, para 26-27.

<sup>69</sup> F. v. Switzerland, para 40.

the marriage legislation in that State being compatible with the European Convention on Human Rights.

### 4.3 TRANSGENDER PERSONS AND RIGHT TO MARRY

*...[A]ny solution of the problem which would amount more or less to a perfect legal fiction of a "change of sex" would be confronted by the problem of interference with the relations to third persons under Family Law and the Law of Succession. Thus there arose the question whether the transsexual could be permitted to enter into mar[r]riage with a member of his former sex. The applicant, who was himself the father of a daughter was an example of such consequences which would follow from the legal recognition of "change of sex"... Her applications aimed at being fully legally recognised as a woman. Therefore they concerned not only the applicant's private sphere but – on the contrary – her legal status in public and in society.<sup>70</sup>*

*Government of Federal Republic of Germany, 1977*

*In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.<sup>71</sup>*

*Grand Chamber of the ECtHR, 2002*

The passages cited above show how the way transgender persons have been perceived in the case law of the European Court of Human Rights has changed during a quarter of a century from doubt and apprehension to a relatively warm embrace. The first passage is from the first case introduced to the ECHR system involving the situation of transgender persons, the decision of *X. against the Federal Republic of Germany* from 1977, and the latter one from the Grand Chamber judgement of *Christine Goodwin v. the United Kingdom* from 2002. It is notable that the opening sentence about the lack of scientific consensus sounds very similar to the argumentation of the European Court in the case of *Fretté v. France*<sup>72</sup> concerning the advisability of childrearing by homosexuals (see Chapter 6.1). Furthermore, it is interesting that reassigning a person's legal sex, in effect a mere written record, is seen as a "perfect legal

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<sup>70</sup> *X. against the Federal Republic of Germany*, 6699/74, Commission decision 15th December 1977, D. R. 11, p. 16, IV A 3), para 3., argument of the Government of the Federal Republic of Germany.

<sup>71</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI, para 90.

<sup>72</sup> *Fretté v. France*, no. 36515/97, ECHR 2002-I.

fiction” (see first opening quote to this section). Are there legal fictions that are more permissible than others, such as adoption and the assumption of paternity in marriage, and others that are seen to be more in the realm of individual desires and ‘make-believe’ in the spirit of the proponents of the symbolic order gender and kinship? Despite the judgement given in *Goodwin* in 2002, not all obstacles to the full enjoyment of one’s rights when undergoing gender reassignment have been lifted, they have just become more complicated, as in the Grand Chamber judgement of *Hämäläinen v. Finland*<sup>73</sup> in 2014.

There has been a plethora of cases dealing with the legal status of transgender persons in the European Court, most of them from the United Kingdom and similar to each other in the legal problems discussed. *Goodwin* in 2002 constituted the turning point, as it recognised, among other issues, the right to marry according to one’s reassigned gender. However, same-sex marriage has by broadening the definition of marriage made some of the questions pertinent from another angle by linking the right to marry for transgender persons and the possibility of same-sex marriage. For many reasons, marriage for fully completed post-operation transgender persons seems to have been easier to accept in the case law of the European Court than same-sex marriage. Transgender identity is and has been more medicalised phenomenon than homosexuality, which translates it into a field of scientific facts, easier to comprehend and digest in a court setting that homosexuality, which is more ambiguous and has been understood as a less clear-cut manner of behaviour or an immutable characteristic on an individual (see McGhee 2001, Heinze 2001).

This can be seen in the outcomes of *Goodwin* and *Schalk and Kopf v. Austria* from 2010<sup>74</sup>: the European Court has accepted that post-operative transgender persons must be able to marry a person of the opposite sex, while it did not find in 2010 that the European Convention supported the right to same-sex marriage. These judgements will be analysed below in this chapter, but for the purposes of introducing the issue, it seems that the claims made by transgender persons who wish to conform to the established gender order of marriage may be regarded as a human rights under the European Convention, but same-sex marriage falls outside this order as the Convention, in the end, does not say much about marriage as it does not protect the right to get out of a marriage either, as seen in the previous sub-chapter. We can see that many applicants have indeed argued their cases with statements that emphasise that they can and do fulfil the criteria of consummation and living together in a heterosexual relationship just as any other heterosexual couple. But how essential is the act of consummation as a marker of marriage in the 21st century?

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<sup>73</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014.

<sup>74</sup> *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

The key cases under the rubric of transgender marriage are *Goodwin* and *I. v. the United Kingdom* from 2002<sup>75</sup> as the judgements were delivered on the same day. The path of transgender persons in the European Court has been a long and arduous one when it comes to the legal recognition of their reassigned gender. Full recognition of one's reassigned gender identity entails a variety of measures, such as adopting a new first name, obtaining new identification and other official documents with the new name and a mention of one's gender – and the right to marry according to one's gender. Most of these cases in the European Court have come from the United Kingdom, and from the case law it can be learned that the medical treatment of “gender dysphoria” and its recognition in the British health care system was, for a long time, more advanced than the legal recognition of the identities of post-operative transgender persons in the country. This does not mean that interesting and important case law has not come from other Member States, but the key case in this area, the Grand Chamber judgement of *Goodwin* in 2002 acts as the culmination of a string of cases<sup>76</sup> from the United Kingdom which were quite similar to each other in content.

In *Goodwin* the applicant had been born in 1937 and was a post-operative male-to-female transgender person. She had experienced a variety of treatments from “aversion therapy” in the early 1960s to hormone therapy, grooming classes and voice training in the 1980s, finalised by gender reassignment surgery in 1990.<sup>77</sup> Over the years, she had experienced harassment at work which, according to her, was not seen as sexual harassment in the English legal system as she was still officially a man. She claimed that she was still experiencing problems at work in a different job as she had had to submit her National Insurance Number to her employer, who had then found out her previous male identity. She also described how she was not entitled to benefits available for women in the United Kingdom at the time, such as lower retirement age (60 years for women and 65 years for men) and, for example, lower insurance premiums for car insurance. Furthermore, she had left many opportunities available for both genders unpursued such as a remortgage offer or claiming a winter fuel allowance as such offers required producing a birth certificate or other identification which revealed her previous identity.<sup>78</sup>

In the European Court, the case of *Goodwin* touched upon a variety of issues in English law where the gender of the person in question mattered: choosing one's name; the possibility to marry according to one's gender; birth certificates and other identity documents; National Insurance contributions,

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<sup>75</sup> *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002.

<sup>76</sup> *Rees v. the United Kingdom*, 17 October 1986, Series A no. 106; *Cossey v. the United Kingdom*, 27 September 1990, Series A no. 184; *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, *Reports of Judgments and Decisions* 1998-V.

<sup>77</sup> *Christine Goodwin v. the United Kingdom*, para 13.

<sup>78</sup> *Christine Goodwin v. the United Kingdom*, paras 15-19.

i.e. social security; state pensions and one's gender-related retirement age in the United Kingdom at the time, revealing one's identity, including previous name in the context of employment and instances of rape and imprisonment. In *Goodwin*, the crux of the matter for the European Court was that the British health care system recognised gender dysphoria and provided treatment for it from public funds, but the legal recognition of one's reassigned gender was imperfect and did not reflect the outcome of the treatment given:

*The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention. Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads.*

Christine Goodwin v. the United Kingdom, para 78

As Goodwin had constructed her complaint mainly under Articles 8, 12 and 14, of which the complaints under Article 8 and Article 12 were successful, first came the recognition of her gender identity as right to respect for private life, and flowing from this, the right to marry according to her reassigned gender.

Interestingly, the European Court referred also to Article 9 of the Charter of Fundamental Rights of the European Union, that "[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". The Goodwin judgement and reference to the Article 9 of the Charter were to be of great importance in the key case concerning same-sex marriage, *Schalk and Kopf v. Austria* in 2010.

*The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view,*

*she may therefore claim that the very essence of her right to marry has been infringed.*

Christine Goodwin v. the United Kingdom, *para 101*

The judgement of *I. v. the United Kingdom*<sup>79</sup>, although not as widely known or cited, was decided on the same day as *Goodwin* by the Grand Chamber. The content of the legal complaint was the same, and a violation of Articles 8 and 12 was found but not a violation of Article 14.

*Rees v. the United Kingdom*, *W. against the United Kingdom*, *Cossey v. the United Kingdom*, and *Sheffield and Horsham v. the United Kingdom* were cases decided between 1986 and 1998 where the essence of the complaints was pretty much the same than in *Goodwin* and *I. v. the United Kingdom*, but the European Court decided against the applicants and left the recognition of reassigned gender identity to the margin of appreciation of the United Kingdom. In *Rees v. the United Kingdom* from 1986<sup>80</sup>, a female-to-male post-operative transgender person complained of not being able to amend his birth record in the English system. In Britain, birth certificates have been, and to a certain extent still are, important identification documents compared to many other States. This is why transgender cases from the United Kingdom in the ECHR system have focused, one after the other, so much on the issue of birth certificates and birth registers. For a long time, the reasoning behind it was as follows:

*An entry in a birth register and the certificate derived there from are records of facts at the time of the birth. Thus, in England and Wales the birth certificate constitutes a document revealing not current identity, but historical facts. The system is intended to provide accurate and authenticated evidence of the events themselves and also to enable the establishment of the connections of families for purposes related to succession, legitimate descent and distribution of property. The registration records also form the basis for a comprehensive range of vital statistics and constitute an integral and essential part of the statistical study of population and its growth, medical and fertility research and the like.*

*Rees v. the United Kingdom, para 21*

Furthermore, in *Rees*<sup>81</sup>, the legal foundation of marriage as a union between persons of the opposite sex was presented as follows:

*In English law, marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others.... Section 11 of the*

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<sup>79</sup> *I. v. the United Kingdom*.

<sup>80</sup> *Rees v. the United Kingdom*, 17 October 1986, Series A no. 106.

<sup>81</sup> *Rees v. the United Kingdom*, para 26.



*Matrimonial Causes Act 1973 gives statutory effect to the common-law provision that a marriage is void ab initio if the parties are not respectively male and female.*

Rees v. the United Kingdom, para 26

Unsurprisingly, the European Court found in 1986 in *Rees* that

*In the Court's opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.*

Rees v. the United Kingdom, para 49

In *W. v. the United Kingdom* from 1989<sup>82</sup>, the applicant argued the case from a different angle than in *Rees*:

*The applicant alleges a violation of this provision because she cannot marry a man and adopt children with him. She submits that her case is different from the Rees case as she could consummate marriage with a man. She considers that the development of the personality and self-fulfilment through a legally recognised life-long union are as valid objectives encompassed by the right to marry as the founding of a family by way of procreation.*

*W. v. the United Kingdom*, para 40

The similarity of *W.* to *Rees* was the problem of amending the vital statistics register. A very influential case from the English legal system was the reasoning of Justice Ormrod in *Corbett v. Corbett*, a case from 1971 which dwelt on the validity of a marriage between a post-operative transgender person and a man. Justice Ormrod was both a medical doctor and a lawyer, and the arguments developed in *Corbett*, encompassing the importance of consummation, too, formed the basis of the view of the government of the United Kingdom defending its policies in the European Court in these cases. (See Collier 1995: 118-21.)

Complaints concerning transgender identity recognition emerged from other Member States as well., such as France, Ireland and Sweden<sup>83</sup>. In the decision of *Eriksson and Goldschmidt v. Sweden* from 1989<sup>84</sup> the applicants

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<sup>82</sup> *W. v. the United Kingdom* (Report of the Commission), no. 11095/84, 7 March 1989.

<sup>83</sup> See also *B. v. France*, 25 March 1992, Series A no. 232-C; *L.F. v. Ireland*, no. 28154/95, Commission decision of 2 July 1997.

<sup>84</sup> *Eriksson and Goldschmidt v. Sweden*, application no. 14573/89, Commission decision of 9 November 1989.

argued that they were just like a heterosexual couple, which resonates with the argumentation in *W. v. the United Kingdom* cited above:

*The applicants are living in a heterosexual relationship. Their request for a marriage licence was rejected by the Parish Civil Registration Office (pastorsämbetet) of Mockfjärd on 11 November 1984 on the ground that both applicants were of female sex.*

Eriksson and Goldschmidt v. Sweden, “*The Facts*”

At the time, Sweden allowed the change of one’s legal sex, but not the right to marry. What can be seen both in *W.* and in *Eriksson and Goldschmidt* was that the applicants argued that the relationships they wanted to make official were heterosexual relationships, either implying or stating explicitly that consummation could take place.

The advent of same-sex partnerships has created a legal problematic of its own which would only be solved with allowing same-sex marriage. In the inadmissibility decisions of *Parry against the United Kingdom*<sup>85</sup> and *R. and F. against the United Kingdom*<sup>86</sup> from 2006 transgender applicants had been and continued to be married to the partners they had before embarking upon their gender reassignment processes. As the reassigned gender of the applicants was to be recognised, their marriages to their spouses would cease to exist. The options available were divorce and changing the relationship into a civil partnership, as after the reassignment process both parties to the union were legally of the same sex. The complaint was deemed inadmissible, as changing one’s status from married to being in a civil partnership was deemed proportionate in the case. As to the concept of marriage, it was left to the Member State and its margin of appreciation, as Article 12 was said to enshrine only the right to marry between a man and a woman.

The Grand Chamber judgement of *Hämäläinen v. Finland* given in 2014<sup>87</sup> reflected the same question. The situation of the applicant, a male-to-female transgender person, and her wife, was further accentuated by the fact that they had a child together and that a divorce was against their religious convictions. In addition, the applicant’s wife did not consent to their marriage being transformed into a registered partnership (*rekisteröity parisuhde*), the form of civil unions available for same-sex couples in Finland since 2001 because she did not regard herself as “a lesbian”<sup>88</sup>. Thus, *Hämäläinen* could not finalise her gender reassignment process and obtain a new social security number, and remained male in the eyes of the law despite changing her name and obtaining some identity documents with this name. In Finland, the form of civil unions for same-sex couples known as registered partnerships offer almost all the

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<sup>85</sup> *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV.

<sup>86</sup> *R. and F. against the United Kingdom*, (dec.), no. 35748/05, 28 November 2006.

<sup>87</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, 16 July 2014.

<sup>88</sup> *Hämäläinen v. Finland*, paras 17 and 55.

rights conferred to married couples, the main differences being not being able to take a common surname, or to adopt children jointly. Likewise, there is no presumption of parenthood within a registered partnership regarding the female partner of a woman giving birth. Same-sex couples, usually female couples, may seek for second-parent adoption after the birth of a child.

In the case of *Hämäläinen* and her wife, not much would have changed, as *Hämäläinen*'s paternity within marriage remained and her parenthood to the child was not under threat<sup>89</sup>. The main practical problems arising from the change in status would be that the couple would not be able to benefit from a presumption of paternity or parenthood if new children were born, and joint adoption would be impossible. However, the text of the case does not spell out what these practical implications would be, so their resistance to the change in status may be seen as almost purely a question of principle. The outcome of the case, no violation of Article 8 or Article 14 taken in conjunction with Article 8, reflects the reluctance of the European Court to judge the question of same-sex marriage as a human right and the fact that these questions are, in a European setting, usually left to national legislatures.

As *Hämäläinen* and her wife were not allowed by the Finnish authorities to remain married after official gender recognition, they were offered the possibility of converting their union into a registered partnership, which did not suit them due to questions of identity and personal conviction, as *Hämäläinen*'s wife did not consider herself homosexual and divorce was against their religious convictions<sup>90</sup>. Thus, on a general level, the case of *Hämäläinen v. Finland* calls for clearly distinguishing issues of gender identity and sexual orientation from each other in the context of marriage. The paradox in *Hämäläinen v. Finland* was that she was granted an exemption when it came to the paternity of the child the couple had had during the marriage – the relation of filiation was not altered or under any risk to be altered due to the gender recognition. So, why the exception in the parent-child relation and not in the marital relation? As a few States offered the possibility of such an exception regarding transgender persons in a marriage existing before a sex reassignment process<sup>91</sup>, it would have been a humane option in *Hämäläinen*'s case as same-sex marriage was not available.

The case of *Hämäläinen v. Finland* highlights how important it is not to confound gender identity and sexual orientation, as it might not respond at all to what the parties to the marriage deem important. *Hämäläinen* and her wife had married with the intention that they would remain married, and *Hämäläinen*'s wife was willing to remain married despite her husband deciding to go through a gender reassignment process. From an external point of view they were required to fulfil the legal categories open to them on the basis of their legal sexes, but from their own, emic point of view they wanted

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<sup>89</sup> *Hämäläinen v. Finland*, para 86.

<sup>90</sup> *Hämäläinen v. Finland*, para 44.

<sup>91</sup> *Hämäläinen v. Finland*, para 32.

to remain married and felt that it was unfair that the State would require them to end their marriage and transform it into a different form of a union. This case also highlights the problems the existence of registered partnerships and similar forms of civil unions open to same-sex couples in the absence of same-sex marriage: if compared to each other, civil unions emerge as a category of quasi-marriage, less valuable in the eyes of the State than full marriage. In this particular case of Finland the practical differences that emerge are the issue of adopting a joint surname and the possibility of adopting together, but on a more general level we may ask if partnerships and marriage are equal if they are not called by the same term. In the case of Finland and *Hämäläinen*, the question will be solved by legalising same-sex marriage, approved by a parliamentary vote in 2014 and to be finalised by 2017.

#### **4.4 SAME-SEX COUPLES, MARRIAGE AND COHABITATION**

Same-sex marriage has in many ways become the debate of our time, as it is so widely discussed, debated and every now and then legislated upon in different States. It has mobilised a huge variety of gay rights and civil society activists, religious groups and politicians for or against. As examples from a number of mainly Western and often European States demonstrate, it is no longer situated in the imaginary realm of utopian legal debate, but it has become law in various parts of the world. But regardless of these advancements, sexual minorities are a group that is very much unprotected by the international human rights regime, and this is very much how the situation remains in the 2010s on a global level. Some basic guidelines on how to apply international law to the protection of LGBT persons have been articulated in the Yogyakarta Principles from 2007<sup>92</sup> (see O’Flaherty and Fisher 2008), but there are no legally binding provisions in human rights conventions of the United Nations concerning sexual orientation and gender identity. In many parts of Europe and North America, sexual minorities are to a great extent deemed worthy of protection. While the Council of Europe and the European Court of Human Rights have taken some very important steps in recent decades regarding the protection of sexual minorities, the European regional human rights system, too, remains relatively conservative vis-à-vis the rights of non-heterosexual persons. In the United Nations system protection is even weaker: despite the decision of *Toonen v. Australia*<sup>93</sup> in 1992, where the existence of anti-sodomy laws was deemed discriminatory and discrimination on the basis of sexual orientation was classified as sex discrimination, the

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<sup>92</sup> See the Yogyakarta principles at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm). Accessed 15 November 2015.

<sup>93</sup> *Toonen v. Australia*, Communication 488/1992, UN Document CCPR/C/50/D/488/1992.

United Nations machinery is still reluctant to consider sexual orientation as a human rights issue due to the fierce opposition of some States.

The history of dyadic sexual relations between adults of the same sex in the European Court of Human Rights is a long and arduous one, even though important steps have been taken from time to time. Before 2010 and the judgement of *Schalk and Kopf v. Austria* given in that year<sup>94</sup> there was no case law articulating whether there is a right to marry or the right to form recognised civil unions for same-sex couples under the European Convention. The judgement did not find support in the European Convention to the idea that the right to contract same-sex marriage is a human right. However, there have been various decisions and judgements that dealt with recognising same-sex cohabitation, and often these fell in the categories of housing or social and health insurance. *Schalk and Kopf v. Austria* from 2010 is the most substantial case so far to dwell on the prospect of same-sex marriage to be covered by the European Convention. Since the judgement was published, it has been subject to a number of analyses which highlight different aspects of it. In essence, the judgement recognised that same-sex couples share *de facto* family life, not just mere private life. In this sense, the judgement was first in its kind. However, the actual outcome of the case was that Article 12 of the European Convention could not be read to guarantee a right to marry for same-sex couples. In a way, in the light of *Schalk and Kopf*, same-sex marriage is a political and legal 'luxury' that may be offered by a State if the national legislator so happens to decide. Of course it is possible that European consensus builds up on the issue and same-sex marriage will become so widely legislated in Member States of the Council of Europe that eventually the European Court will interpret Article 12 in favour of it. However, the wording of Article 12 (above) is not exactly very promising, as the right to marry is relegated almost entirely to "the laws governing the exercise of this right".

The case concerned a same-sex couple who judicially challenged the inability to contract a marriage. Schalk and Kopf were a male couple in their forties living in Vienna. In 2002, they contacted their local Office for Matters of Personal Status<sup>95</sup> and asked the officials to open a process for obtaining the possibility to marry. The Vienna Municipal Office replied the same year and told the applicants that they could not marry because they were of the same sex, and the Austrian Civil Code stipulated that marriage partners must be two persons the opposite sex. The second instance where Schalk and Kopf complained to, the Vienna Regional Governor, stood by the view of the Municipal Office and stated that the Article 12 of the European Convention proclaimed the right to marry to apply to an opposite-sex couple.<sup>96</sup> The applicants proceeded to a constitutional complaint, evoking the right to

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<sup>94</sup> *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

<sup>95</sup> *Schalk and Kopf v. Austria*, para 8.

<sup>96</sup> *Schalk and Kopf v. Austria*, para 10.

respect for private and family life and the principle of non-discrimination. Schalk and Kopf argued that

*... the notion of marriage had evolved since the entry into force of the [Austrian] Civil Code in 1812. In particular, the procreation and education of children no longer formed an integral part of marriage. According to present-day perceptions, marriage was rather a permanent union encompassing all aspects of life. There was no objective justification for excluding same-sex couples from concluding marriage, all the more so since the European Court of Human Rights had acknowledged that differences based on sexual orientation required particularly weighty reasons by way of justification.*

Schalk and Kopf v. Austria, para 11

In 2002, the applicants complained of the fact that in Austria at the time, there was no civil partnership legislation nor same-sex marriage. The law on registered partnerships was passed in 2009 and came into effect in 2010, the same year the ECHR judgement was given. In the European Court, the applicants evoked Article 12 and Article 14 taken in conjunction with Article 8. The European Court deemed these complaints admissible but found no violation of either Article.

What is important is that despite the outcome of the judgement, same-sex couples were seen to share family life in contrast to earlier case law according to which they shared only private life. The European Court noted that “rapid evolution of social attitudes towards same-sex couples has taken place in many member States”<sup>97</sup> and that “[c]ertain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of “family””<sup>98</sup>. It proceeded to argue that

*In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.*

Schalk and Kopf v. Austria, paras 93-94

In contrast to *Schalk and Kopf*, the Grand Chamber judgement of *Burden v. the United Kingdom*<sup>99</sup> from 2008 deserves to be discussed in conjunction with the question of same-sex marriage, or rather regarding what is not

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<sup>97</sup> *Schalk and Kopf v. Austria*, para 93.

<sup>98</sup> *Schalk and Kopf v. Austria*, para 93.

<sup>99</sup> *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008.

deemed as analogous with same-sex partnerships. In this case, two elderly sisters living together complained that they should have been able to contract a civil partnership or to receive similar tax exemptions and benefits. Even though the case does not, as such, deal with the distinction between private and family life or discrimination thereof, the issue of limiting marriage-like partnerships to sexual relationships is a question that deserves discussion. The sisters, born in 1918 and 1925, lived together in a house they had inherited from their parents. According to the case material, they “lived together, in a stable, committed and mutually supportive relationship, all their lives”<sup>100</sup> of which over thirty years in the house they owned together. They complained of the fact that one of them would be subject to a higher degree of inheritance tax compared to if they were a married couple (wife and husband) or a same-sex couple in a civil partnership. In the United Kingdom, property that is passed from one spouse to another is exempt of inheritance tax. From December 2005 onwards, parties to civil partnerships have been seen as spouses for the purposes of inheritance taxation.<sup>101</sup>

What made this case peculiar was also that in Britain the threshold for inheritance tax is very high compared to many other European States – GBP 300,000 at the time of the *Burden* case being heard in Strasbourg – so the situation of sisters *Burden* represented the plight of a thin slice of society who are already well off. In the end the Grand Chamber came to the conclusion that there had been no violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 1 of Protocol 1 (peaceful enjoyment of one’s possessions). However, the case did provide an ample opportunity for the European Court and its Grand Chamber to dwell on the object and purpose of marriage, civil partnerships (as they are called in Britain) and the demarcation of relations involving intimate, sexual relations and kin relations. Undoubtedly, “stable, committed and mutually supportive relations” may exist between a plethora of different categories of persons such as parents and children, siblings, friends and so on. One might well argue what have sex, romantic love or prohibited degrees of relationships have got to do with “stable, committed and mutually supportive relations”. However, civil partnerships and equivalent arrangements were created for the sake of claims for equality between heterosexual and non-heterosexual couples, and they stay within the logic of this framework.

On the basis of the argumentation of the Grand Chamber, it seems that placing informal unions of siblings on a par with marriage and civil partnerships would have been an uncomfortable step for the European Court, as then it would have placed ‘unions of blood’ in an analogous position with marriage, the original blueprint, albeit by proxy. From the outset, it seems extraordinary that the *Burdens* decided to make their claim for eased inheritance taxations in terms of an analogy to civil partnerships. Obviously,

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<sup>100</sup> *Burden v. the United Kingdom*, para 10.

<sup>101</sup> *Burden v. the United Kingdom*, para 15.

English inheritance taxation places marriage, and from 2005, civil partnership, as privileged relations, and this can be criticised from a variety of positions (see e.g. Barker 2006). However, taxation rules constitute an altogether different issue that deals with the distribution of goods between heirs and society at large. Categories of close relationships that qualify for tax exemptions, e.g., in inheritance issues are rules open to manipulation distinct to the larger framework of marriage and civil unions, and, if an analogy to prohibited degrees of relationships and incest prohibitions is allowed, lie within the society in question to be changed.<sup>102</sup>

In the judgements of *Vallianatos and others v. Greece* from 2013<sup>103</sup>, the issue at stake was whether the Greek Government had discriminated against same-sex couples when enacting a law allowing civil unions for opposite-sex couples, a kind of a lighter form of marriage. The complaint was brought to the European Court not just by one or two individuals but in the name of eight different individuals under two different complaints, both of which were supported by non-governmental organisations. The structure of the complaint was that “relying on Article 8 taken in conjunction with Article 14, that the fact that the ‘civil unions’ introduced by Law no. 3719/2008 were designed only for couples composed of different-sex adults had infringed their right to respect for their private and family life and amounted to unjustified discrimination between different-sex and same-sex couples, to the detriment of the latter”<sup>104</sup>. The arguments given by the Greek Government for creating this kind of a new form of partnerships<sup>105</sup> are particularly interesting. The aim of the law on civil partnerships, it appears, was not really to give more a wider variety of options for opposite-sex couples to lead the kind of life and enter into the kinds of unions they chose, but to regulate reproduction outside marriage, as children born to cohabiting or officially single women were often left without the parental protection of the father:

*...the legislation on civil unions should be viewed as a set of provisions allowing parents to raise their biological children in such a way that the father had an equitable share of parental responsibility without the couple being obliged to marry. Civil unions therefore meant that, when the woman became pregnant, the couple no longer had to marry out of fear that they would not otherwise have the legal relationship they desired with their child since he or she would be regarded as being born out of wedlock. Hence, by introducing civil unions the Greek legislature had shown itself to be both traditional and modern in its thinking... [T]he legislature had sought to strengthen the institutions of marriage and the family in the traditional sense, since the decision to marry would henceforth be taken irrespective of the prospect of*

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<sup>102</sup> See Schneider (1984) for a succinct analysis of *No Just Cause* (Report by a Group... 1984).

<sup>103</sup> *Vallianatos and others v. Greece* [GC], no. 29381/09 and 32684/09, 7 November 2013.

<sup>104</sup> *Vallianatos and others v. Greece* [GC], para 3.

<sup>105</sup> See *Vallianatos and others v. Greece* [GC], para 10.



*having a child and thus purely on the basis of a mutual commitment entered into by two individuals of different sex, free of outside constraints. ...[T]he introduction of civil unions for same-sex couples would require a separate set of rules governing a situation which was analogous to, but not the same as, the situation of different-sex couples.*

Vallianatos and others v. Greece, paras 62-63

However, the Grand Chamber of the European Court found by sixteen votes not one that there had been a violation of Article 14 taken in conjunction with Article 8: the applicants had been subject to discrimination on the basis of their sexual orientation as the Greek law on civil partnerships excluded same-sex couples. The European Court did not want to establish that there was a 'European consensus' on offering same-sex couples the possibility of a civil partnership, but pointed out that "a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships"<sup>106</sup>, and that the Greek Government had not given reasons weighty enough to establish that enacting a legislative instrument separate from marriage that excluded same-sex couples would have been justified. The European Court noted that

*The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it... Also, given that the Convention is a living instrument, to be interpreted in present-day conditions... the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one's family or private life[.]*

Vallianatos and others v. Greece, para 84

The protection of same-sex sexual relationships has proceeded in the European Court through different phases, starting with attempts to decriminalise homosexual conduct and proceeding to discuss what constitutes as private life, family life and respect for the home, all under Article 8. 'Respect for the home' is important here, as some of the pivotal cases have concerned cohabiting same-sex couples where the surviving partner after the death of another has been unable to secure a lease.<sup>107</sup>

First attempts to challenge legislation criminalising homosexual activity came from the Federal Republic of Germany, attacking paragraph 175 of the

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<sup>106</sup> Vallianatos and others v. Greece [GC], para 91.

<sup>107</sup> S. v. United Kingdom, no. 11716/85, Commission decision 26<sup>th</sup> August 1986 and Karner v. Austria, no. 40016/98, ECHR 2003-IX.

penal code of the Federal Republic of Germany. The European Commission of Human Rights, the screening body of the European Court that existed at the time, declared these complaints inadmissible (Grigolo 2001, Johnson 2013). The principle of the decriminalisation of homosexuality was tackled in the judgement of *Dudgeon v. the United Kingdom*<sup>108</sup>, which became a landmark judgement in the European Court regarding the decriminalisation of homosexual activity. The case was brought to the ECHR by Jeffrey Dudgeon, an activist of the Northern Ireland Gay Rights Association in 1975. In 1981 the European Court delivered a judgement on the case and ruled that the anti-sodomy laws in Northern Ireland violated the right to 'respect for private life' under Article 8 of the Convention. By this time, other parts of the United Kingdom no longer had laws in place criminalising homosexual activities. In the cases of *Norris v. Ireland* from 1988<sup>109</sup> and *Modinos v. Cyprus* from 1993<sup>110</sup> the European Court delivered similar decisions, condemning the criminalisation still in place in the respondent States. Ireland and Cyprus changed their laws in 1993 and 1995 respectively.

However, in *Dudgeon* the European Court was still of the opinion that a certain degree of control with respect to homosexuality was justifiable, which meant that different ages of consent for homosexual and heterosexual relations were allowed. Differences in age of consent were condemned in *Sutherland v. the United Kingdom* from 2001 in which the complaint to the European Court was made in 1994<sup>111</sup>. However, the complaint did not lead to a reasoned judgement per se as the case was struck off the list of pending cases due to legislative changes in the United Kingdom equalising age of consent in heterosexual and homosexual relations. The fact that homosexual relationships were seen as part of one's private life, not family life, remained a constant dictum for about three decades. For example, in the decision of *X. and Y. against the United Kingdom*<sup>112</sup> where a British man, Y, and a Malaysian man, X, tried to live together in the United Kingdom, but as X's temporary residence permit was not renewed, they could not remain in the UK. The Commission found that "[d]espite the modern evolution of attitudes towards homosexuality... the applicants' relationship does not fall within the scope of the right to respect for family life ensured by Article 8"<sup>113</sup>.

In the decision of *S(impson) v. the United Kingdom* from 1986<sup>114</sup>, a British woman had filed a complaint against the order to be evicted from the dwelling she had been sharing with her female partner. Her partner had been the secure tenant of the lease, and after her death Simpson was to be evicted from the

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<sup>108</sup> *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45.

<sup>109</sup> *Norris v. Ireland*, 26 October 1988, Series A no. 142.

<sup>110</sup> *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

<sup>111</sup> *Sutherland v. the United Kingdom* (striking out) [GC], no. 25186/94, 22 March 2001.

<sup>112</sup> *X. and Y. against the United Kingdom*, no. 9369/81, Commission decision of 3 May 1983.

<sup>113</sup> *X. and Y. against the United Kingdom*, p. 221.

<sup>114</sup> *S. v. United Kingdom*, no. 11716/85, Commission decision 26<sup>th</sup> August 1986.

property. Under domestic law, that being Section 30 of the Housing Act of 1980, 'living together as husband and wife' or common law marriage is one of the conditions entitling a survivor of a couple, married or unmarried, to succeed to a tenancy after the secure tenant dies. In front of the Commission of Human Rights, Simpson complained that respect for her private and family life had been interfered with and that she had been discriminated against because she was of the wrong sex in the given situation, so she invoked Articles 8 and 14 of the Convention. However, the Commission admits in its decision that if she had been of the male sex she would have been treated differently. It also "finds that the aim of the legislation in question was to protect the family" and that the "aim itself is clearly legitimate"<sup>115</sup>.

In the decision of *Röösli v. Germany*<sup>116</sup> from 1996 a man who had been living with his male partner in a rented flat in Munich was subject to eviction after his partner's death. According to the case material, the Munich District Court argued that "...the views on marriage and family had changed in society and justified the extension of the said provision to heterosexual couples. However, homosexual or lesbian couples were not similarly accepted in society"<sup>117</sup>. In the European Court, Röösli evoked Article 14 taken together with article 8. The Commission argued that as Röösli had been living alone after his partner's death, and that his relationship with his deceased partner did not amount to family life:

*The question remains, however, of whether it was justified to protect families but not to give similar protection to stable homosexual or lesbian relationships. The Commission recalls that the family, to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated, merits special protection in society and that there is no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepted that the difference in treatment between the surviving partner of a homosexual or lesbian couple and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified.*

Röösli against Germany, "The Law"

In the 2001 decision of *Mata Estevez v. Spain* from 2001<sup>118</sup> the issue at stake was not succession to a tenancy, but the situation was quite similar as the other half of a male couple had died in an accident and the surviving partner claimed a survivor's pension, arguing his case with Article 14 taken in conjunction with Article 8.

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<sup>115</sup> *S. v. United Kingdom*, para 7.

<sup>116</sup> *Röösli v. Germany*, no. 28318/95, Commission decision of 15 May 1996.

<sup>117</sup> *Röösli v. Germany*, "The Facts".

<sup>118</sup> *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI.

*The applicant complained of the difference of treatment regarding eligibility for a survivor's pension between de facto homosexual partners and married couples, or even unmarried heterosexual couples who, if legally unable to marry before the divorce laws were passed in 1981, are eligible for a survivor's pension. He submitted that such difference in treatment amounted to unjustified discrimination which infringed his right to respect for his private and family life. He relied on Articles 8 and 14 of the Convention.*

Mata Estevez v. Spain, p. 3

The complaint made by Mata Estevez was unsuccessful, as the European Court relied on its previous case law, such as *X. and Y. against the United Kingdom* and *S. against the United Kingdom*.<sup>119</sup>

The turning point tenancy succession concerning same-sex couples took place only in 2003 in the judgement of *Karner v. Austria* from 2003<sup>120</sup>. Mr Karner, the applicant, had a homosexual relationship with another man, W. They began living together in 1989. In 1991, W discovered he was terminally ill. W. designated Karner as the successor of his estate. After the death of W., the landlord brought proceedings against Karner in order to terminate the tenancy. The local District Court and the Regional Civil Court were of the opinion that the 1974 Rent Act applied also to same-sex partners. However, the landlord took the case to the Supreme Court, which decided that the term 'life companion' should be interpreted in the way the legislators intended in 1974, which did not include homosexual relationships. In Section 14, paragraph 3 of the Austrian Rent Act 'life companion' was defined as "a person who has lived in the flat with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage"<sup>121</sup>. The Supreme Court quashed the decision of the Regional Civil Court and terminated the lease.

An application to the European Court was made in 1998. Karner himself died in 2000, four years after the decision of the Supreme Court. The Austrian government requested that the case would be struck out of the list of cases pending in the European Court, as the applicant was deceased and had no heirs wishing to pursue the case. Karner's representative stressed that the issue at hand was an important domestic legal issue in Austria and a relevant issue pertaining to human rights protection at large. The European Court found that if Karner had been a woman, he would have been able to succeed to W.'s tenancy. Thus, he was given differential treatment because of his sex (or sexual orientation). The Court found that Article 14 was applicable. The Austrian government maintained that "the aim of the relevant provision of the

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<sup>119</sup> *Mata Estevez v. Spain*, p. 4.

<sup>120</sup> *Karner v. Austria*, no. 40016/98, ECHR 2003-IX.

<sup>121</sup> *Karner v. Austria*, para 19.

rent Act had been the protection of the traditional family”<sup>122</sup>. It is interesting to note that according to this interpretation, ‘traditional family’ also includes unmarried heterosexual cohabitation, not just families formed by legally sanctioned marriage. The European Court accepted that “protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment”<sup>123</sup>. The European Court found that the Government had not given reasons that were weighty enough to justify the interpretation of the Supreme Court. It is important to note that in *Karner*, the issue at stake was ‘respect for the home’ under Article 8 of the Convention. Thus it did not touch upon ‘family life’ or deliver a ‘gay-friendly’ decision as such in favour of recognising same-sex partners as family members.

The outcome of *Karner* was reiterated by the European Court in the judgement of *Kozak v. Poland* from 2010<sup>124</sup>, which also dealt with the entitlement to a tenancy of a flat in the context of a male couple after the death of one of one partner. The European Court found a violation of Article 14 taken in conjunction with Article 8, thus discrimination on the basis of sexual orientation. It is in this judgement that the European Court applies a commonsensical meaning of the word “relational” pertaining to relations between applicants:

*However, in pursuance of that aim a broad variety of measures might be implemented by the State... Also, given that the Convention is a living instrument, to be interpreted in the light of present-day conditions... the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.*<sup>125</sup>

*Kozak v. Poland*, para 98

Thus, shortly before *Schalk and Kopf* during the same year, the European Court gave in *Kozak* indirect but surprisingly strong support to the idea that same-sex couples are entitled to their “way” or “choice” in life. However, in *Schalk and Kopf* this materialised only to the extent that *de facto* family life applied to same-sex couples as well. However, regarding the stern placement of homosexual relations in the realm of private life but not family life in earlier years, the European Court has come a long way, culminating so far in *Vallianatos* (and *Oliari and others v. Italy* in 2015) even if not all the way towards gender-neutral alliance. The question that remains is whether

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<sup>122</sup> *Karner v. Austria*, para 35.

<sup>123</sup> *Karner v. Austria*, para 40.

<sup>124</sup> *Kozak v. Poland*, no. 13102/02, 2 March 2010.

<sup>125</sup> Emphasis added. The passage is quoted in *X. and Others v. Austria*, para 139.

different forms of alliance – marriage, civil unions and cohabitation as *de facto* family life – are equal enough compared to each other.

## 4.5 DISCUSSION: TOWARDS GENDER-NEUTRAL ALLIANCE

*The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies.*<sup>126</sup>

*American Anthropological Association (2004, no pagination)*

These cases, described and analysed under four rubrics – state intervention in the right to marry, the possibility of divorce, transgender marriage and same-sex marriage – highlight the importance of alliance among personal relations in the sphere of family life. Alliance, in contrast to filiation, often comes before filiation in the constitution of a family unit, be the unit understood as a formal or informal union of two adults: cohabitation, marriage or civil union. What is interesting from a sociological and anthropological point of view is how the historical process of *démariage* (Théry 1993), the undoing of the practical and symbolic importance of marriage, interacts with the idea of human rights or individual rights in general. In the context of *B. and L. v. the United Kingdom*, marriage prohibitions stemming from religious tradition were at odds with contemporary notions according to which a union is acceptable if it does not involve close blood relatives, i.e. a parent and his or her child or siblings. Affinity created through marriage in the form of acquiring “in-laws” is not seen as a bar to marriage as the parties are not genetically related. Of course this is just the essence of the rule of incest in our Euro-American culture today, and exceptions such as ties created by adoption may fall in the same category. As a concept, *démariage* is both about undoing marriage – “de-marriage”, as it were – in the sense of seeing the possibility of separation and divorce as part of the concept of marriage. In a more general and less literal sense, it is about the privatisation of marriage as an institution giving a certain status individual couples vis-à-vis the State.

The cases in the first category help in reflecting on the role of the State as a “guarantor of reason”, as one of Legendre’s central ideas has been translated

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<sup>126</sup> A statement made by the Executive Board of the American Anthropological Association on 25<sup>th</sup> February 2004 commenting on the constitutional amendment proposed by President George W. Bush to bar marriage from same-sex couples. (See American Anthropological Association 2004)

to English (Robcis 2013: 257, Green 2005: 257, Spire 2001) which refers to certain commonly shared rules that dictate that persons entering marriage must be alive, of full age, of a capacity to consent to the marriage and the marriage must be performed by a person representing an institution that has been vested with the authority to do so. However, the conflict of the role of the State as representing reason shows that what is deemed as rational and ‘reasonable’ is subject to shifts in epistemic contexts, as marriage rules regarding affines (the “in-law” category of relatives) were not seen as compatible with an individualised legal culture of human rights in the European context. The *démariage* thesis would provide that marriage can be both undone and re-constituted with another person, and prohibitions concern categories of persons that are blood relatives, who share a genetically and a scientifically determinable link. This does not mean that analogies could not be drawn, as for example same-sex marriage has been built on the same categories and prohibitions as opposite-sex marriage. In Nedelskyan terms, in *B. and L.* and *Waser and Steiger*, relations were restructured with the help of human rights law from the European Convention so that non-consanguineous relations would not create an obstacle in marrying a person of one’s choice even though he or she was an affine, regardless of the private turmoil or indignation it might produce.

Within established international and European human rights jurisprudence, the right to marry a person of one’s choice is regarded as a fundamental human right as long as the person one wants to marry is of the right sex, age and falls into other categories of an acceptable spouse. These criteria vary from one State to another, especially today regarding the possibility of same-sex marriage in many European jurisdictions. The possibility of divorce, regardless of its commonplace nature and reduced social stigma in contemporary European societies, has very rarely been addressed as a human rights issue. The European Court of Human Rights is careful not to touch on weighty ethical questions such as abortion on demand<sup>127</sup>, and divorce seems to fall, at least historically, in this same category. However, under the European Convention on Human Rights, as the right to marry under Article 12 is subject to the national legislation in place in the Member State (“... according to the national laws governing the exercise of this right”), so Member States are fairly free to decide what constitutes marriage in their respective jurisdictions. However, the right to marry seems lop-sided if there is no recognised possibility of undoing an existing marriage and remarrying. But as divorce has been legalised all European States by legislatures sometimes organising a referendum in order to canvas public opinion<sup>128</sup>, human rights institutions have been relieved on taking a stance whether there is a human right to divorce or not.

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<sup>127</sup> On the issue of abortion, see *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010 (not in data).

<sup>128</sup> Malta was the last State to legalise divorce in 2011 (“MPs in Catholic... 2011).

The last two categories display contemporary debates focusing on the “de-gendering” of marriage (see Barker 2012: 121 and Ball 2014: 136). This may be understood as the expansion and/or redefinition of the concept of marriage. What seems to be the crux of the issue is that the nature, form and purpose of sexual activity of marriage have become more and more private issues. In certain legal systems, the physical act of consummation of marriage still plays a role, but for the most part, contemporary secular law is not that interested in what happens or does not happen in the bedrooms of married couples. The logic of consummation is mainly linked to reproduction, but the advent of various forms of fertility treatments due either to physical infertility or lack of a partner of the opposite sex have brought about the debate concerning “a human right to reproduce non-coitally”<sup>129</sup>, i.e., coitus is not a prerequisite for legitimate reproduction. Iacub (2009) raises interesting questions about the role of impotence and infertility within the institution of marriage. The ability to procreate and the act of consummation have been, and still are, key elements of marriage in many religious legal traditions.<sup>130</sup> From today’s viewpoint, could one establish that same-sex marriage is a logical outcome of the privatisation of marriage as an institution where the physical consummation of marriage or its absence are not grounds for declaring the marriage null and void? In the case law of the European Court, transgender persons and the right to marry are seen as less problematic as marriage is upheld as a union between a man and a woman. Even though the issue of consummation is not touched upon, it is evident that it is not relevant in the context of post-operative transgender persons wishing to marry according to their reassigned gender. As a person’s physical characteristics are medically and surgically altered to match their psychological identity, marrying according to one’s reassigned gender is not a matter of physical identity, as it was e.g. in the impotency trials in France in 19th and 20th centuries described by Iacub (2009: 101-124).

Case law touching upon the right to marry for transgender persons and same-sex couples rest on an uncomfortable double bind, as they highlight the importance of both legal sex as an administrative category and the physical characteristics of a person, be they surgically modified or not. Judgements such as *Christine Goodwin v. the United Kingdom* are needed to confirm the right of an individual to obtain the medical and legal changes needed in order to be able to express one’s identity and live according to it. However, all of this rests on the idea marriage is a union of a man and a woman capable of an act of coitus – it does not have to comprise the possibility of the act of coitus being fertile. This illustrates what even contemporary notions of marriage, to some

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<sup>129</sup> The closest the European Court has come to acknowledging such a right was in the judgment of *S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011. (See sub-chapters 6.3 and 6.4 on assisted procreation).

<sup>130</sup> Otherwise, as in one of Iacub’s sources, a judgement from France in given in 1808 (Cour d’appel 27 Jan 1808-2-214), reads, persons of the same sex could be married (see Iacub 2009: 105).



extent, rest on, and raise the question of whether it really is of interest to the State today what people are capable of doing in their bedrooms. True respect for private life and intimacy need not concentrate on such matters?<sup>131</sup> This would be the perspective of *démariage* in this context, as the rethinking of privacy and intimacy would amount to restructuring relations in order to protect not just equality but the most private and intimate expressions of a person, too.

Same-sex marriage is seen as more problematic than transgender marriage by the European Court. Is this a conceptual problem, ‘marriage’ meaning a union between a man and a woman by definition, or a politically and temporally bound problem, pointing to the lack of European consensus in the matter? The case material in *Schalk and Kopf v. Austria* seems to point to the latter alternative, as the Court did acknowledge the existence of *de facto* family life between a same-sex couple, a minute victory of sorts in itself. If marriage is to be understood as a private contract, intimacy should be left to the truly private sphere. If transgender persons are allowed to marry, the male-female dichotomy has already been understood in a broader manner than in the days when a person’s legal sex assigned at birth was the one that mattered. As same-sex marriage is a reality in close to a dozen Member States of the Council of Europe<sup>132</sup>, the original physical sex of the marriage partners really does not play such an important role in defining marriage and marital relations in many existing legal arenas.

As can be seen from the earlier case law regarding same-sex relations, decriminalisation and equalising the age of consent were first steps in recognising that homosexual relations were worthy of protection within the sphere of private life, and of the home as well as noted in the tenancy cases discussed above, culminating in *Karner v. Austria*. What comes across from these narratives is that the concepts of ‘private life’ or ‘home’ did not recognise the fuller picture of an enduring relationship between two persons of the same sex. *Schalk and Kopf v. Austria* came to mean that same-sex couples may share *de facto* family life, but despite the victory in *Vallianatos and others v. Greece* in setting same-sex and opposite-sex couples on a par with each other regarding access to civil unions, this might not be enough to make alliance gender-neutral. As may be read from the Grand Chamber judgement of *Hämäläinen v. Finland*, according respect and recognition to intimate dyadic relationships between adults is a tricky business. It may be argued that civil unions often emerge as a less valued category compared to marriage, as they constitute a category of their own, and usually including less entitlements than

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<sup>131</sup> Such a focus on respect for privacy and intimacy has been raised by the Finnish legal historian Anu Pylkkänen (2012) and resonates with the idea of critique of the “sexual family” of Martha Fineman (1995).

<sup>132</sup> For same-sex marriage and civil unions, see survey of comparative law in *Oliari and others v. Italy* from 2015, paras 53-5. For a similar survey from the point of view of transgender persons, see *Hämäläinen v. Finland* from 2014, paras 31-33.

in marriage. Marriage has changed considerably over the centuries to embrace, at least on the level of gender-neutral language in legislation, the full capacities of women as legal subjects. Why is it then barriers between ‘quasi-marriage’ and marriage exist? This depends on what marriage is seen to represent today: in Théry’s words, what is at the heart of marriage (or alliance?), is it the couple or the presumption of paternity (Théry cited in Grosjean 2012)? In many legal systems, the emphasis is still on the presumption of paternity and the triad of husband, wife and child(ren) that marriage creates, not just the marrying couple. If the protection of privacy and intimacy is taken seriously and reproduction is not seen as a vital function of marriage, the shift described by Théry is very apt indeed. If, from a Nedelskyan viewpoint, the objective is to protect values such as equality, non-discrimination, public recognition of sexual and gender identities and close personal relations, sexual relations between adults resulting in cohabitation and companionship should be protected in the same manner be they heterosexual, homosexual or anything else. Here, equality as symmetry is easily instituted, and judging by the outcome of *Oliari and others v. Italy*<sup>133</sup> in 2015, a certain amount of consensus between European States may be said to have emerged. However, shifting emphasis in marriage (and alliance) from paternity to couplehood does not mean that the conundrum of paternity would not need to be handled, and this is what happens in the following chapter.

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<sup>133</sup> *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015 (not in data).

## 5 CONSANGUINITY: MATERNITY AND PATERNITY

*No uncertainty can exist about knowledge on maternity. A woman who gives birth is a mother and a woman cannot help but know that she has given birth; maternity is a natural and social fact. But a considerable gap in time separates any act of coitus from the birth of a child; what is then the connection between the role of a man in sexual intercourse and childbirth? Paternity has to be discovered or invented. Unlike maternity, paternity is merely a social fact, a human invention.*

*Carole Pateman (1988: 35)*

This chapter discusses how relations of consanguinity, or relations of ‘shared blood’, between parents and children are recognised and come into being in the realm of law, specifically the case law of the European Court of Human Rights. This is broken down to the very asymmetrical categories of genetic and gestational maternity and genetic paternity. As can be seen from the case law described in this chapter, maternity, too, and not just paternity, can be technical and complicated when it comes to the legal recognition of the relation between a birth parent and a child. Paternity, in turn, is in essence a socially constructed relation on the basis of certain assumptions and declarations, and genetic proof is sought only if deemed relevant. Both maternity and paternity may be subject to recognition and disavowal, but especially in the case of paternity, historical change in the form of existence and availability of genetic testing has transformed how it is attributed. However, even in the case of near conclusive scientific proof, paternity as a legal relation does not rest solely on genetic relations.

This chapter focuses on consanguinity, meaning biological or genetic and gestational relations and the question of knowing one’s origins, a recurring theme in human rights debates concerning parentage in various contexts. In this study, I apply the term ‘biological’ to refer to something more comprehensive than mere genetic relations. In the context of maternity, coital, genetic and gestational relations often go together, and form not just a physical but a psychological and emotional relation, be it positive or negative, with the foetus and the child born. In the context of paternity, coital and/or genetic relations may be assumed under biological relations. In some contexts, as can be seen from the case law analysed in this chapter, unrecognised fathers may have been involved in the day-to-day reality of the gestational process if they have been in a close relationship with the birth mother<sup>1</sup>. For the sake of accuracy, I will use ‘genetic’ and ‘gestational’ when narrowly applicable and ‘biological’ when a larger ensemble of relations such as this is at stake.

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<sup>1</sup> For example *Keegan v. Ireland*, no. 16969/90, 26 May 1994, Series A no. 290.

Furthermore, maternity and paternity refer to the legal relations of parentage in question and ‘motherhood’ and ‘fatherhood’ to the social aspects of parental relations.

Compared to case law dealing with the various kinds of conflicts arising from determining paternity, cases concerning the constitution or the denial of maternity in the ECHR are numerically scarce but tend to be qualitatively and historically dense textual accounts. Well-known and widely commented cases such as *Marckx v. Belgium* from 1979<sup>2</sup> and *Odièvre v. France* from 2003<sup>3</sup> offer a lot of food for thought, as well as perhaps less widely studied judgements and decisions dealing with the practice of anonymous birth and giving children up for adoption<sup>4</sup>. What these cases have in common is that they shed light on the constitution of maternity as a socio-legal relation, as a formally recognised parent-child relation between a woman and a child. In contrast to paternity cases, the question at hand often concerns the rejection of maternity after a child is born. Complaints coming from States such as Belgium, France and Italy where the Napoleonic code (*Code Napoléon*, 1804) has been influential in setting norms of family law display how, contrary to the ancient principle of Roman law, *mater semper certa est* (“the mother is always known”)<sup>5</sup>, maternity relied not so much on the fact of giving birth, but on a woman’s (and a man’s) status: the main difference was whether the parents of the child were married or not. This way of thinking is still reflected in the practice of anonymous birth. A woman may give birth anonymously or keep her identity secret in France, Luxembourg, Austria, Germany, Czech Republic, Greece, Italy, Russia and Ukraine (Simmonds 2013: 263).

In some of these countries, the practice has been introduced in recent times, but in others, such as France, it has a long-standing history and has been made use of by different groups of women in different eras. Iacub has provided an interesting account of the practices of dealing with and circumventing maternal filiation in her book *L’Empire du ventre* (“Empire of the belly”, 2004). As the subtitle of the book, *Pour une autre histoire de la maternité* (“For another history of maternity”) suggests, her account of the practices of recognition of maternity without giving birth, anonymous birth and modern-day surrogacy arrangements offer an alternative history of maternity in 19th and 20th century France. Findings concerning the French legal and political context is not always directly applicable to other European national contexts, but, for example, modern-day examples of dealing with infertility through arrangements that raise questions on whether they are illicit

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<sup>2</sup> *Marckx v. Belgium*, no. 6833/74, 13 June 1979, Series A no. 31.

<sup>3</sup> *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III.

<sup>4</sup> For example, *Kearns v. France*, no. 35991/04, 10 January 2008, *Godelli v. Italy*, no. 33783/09, 25 September 2012.

<sup>5</sup> See Digest of Justinian 2.4.4.3 and, for example, the judgement of the Supreme Court of Ireland *M.R. and D.R. & others v. An t-Ard-Chlazaritheoir & others* [2014] IESC 60 (07 November 2014), para 69, in Sources.

surrogacy arrangements have wider relevance, as similar cases can be found from ECHR case law as well<sup>6</sup>. The book is a rich and historicised reminder of how maternity, or maternal filiation, the recognised socio-legal relation between a mother and a child, is not really as certain as we tend to think it is. This can be seen in ECHR case law as well: *Marckx v. Belgium* acts as a starting point to this trajectory, showing that without the legal recognition of the act of birth as the fundamental element of a mother-child relation, the woman giving birth and the child born would be legal strangers to each other. Furthermore, contemporary issues surrounding maternity brought about by different forms of medically assisted reproduction such as *in vitro* fertilisation (IVF) and the possible separation of genetic and gestational maternity, situations of egg donation and/or surrogacy have their earlier counterparts such as certain form of births out of wedlock, recognising a child without giving birth to one and anonymous births. (See Iacub 2004.) In short, contrary to Carol Pateman in the opening quote to this chapter (1988: 35), maternity is by no means self-evident.

The establishment or disestablishment of legal relations between children and their parents provides some of the most fascinating examples of the variety of administrative techniques and solutions deployed in the establishment of family relations. This is most evident in cases where children have been born outside marriage and their establishment of relations of filiation to putative or actual mothers and fathers. The adage in the legal code of the Roman emperor Justinian from the 6th century, *mater semper certa est*, is deeply ingrained in European legal imagination and maternity is often thought to follow unquestionably from the fact of birth. However, in jurisdictions modelled the Napoleonic Code, the status of children born out of wedlock has been subject to very different notions of establishing parentage, which categorised children as either 'legitimate' and 'illegitimate' depending on whether they were born to a married couple or not. (Iacub 2004.) Thus, the (partly historical) question of status is not just about married and unmarried men and women but to a great extent about children and their standing vis-à-vis each other in a given State.

The judgement of *Marckx v. Belgium* delivered by the European Court of Human Rights in 1979 was a decisive point in setting the standard of the equal treatment of all children regardless of the marital status of their parents in European human rights law. In the judgment, the problem from a socio-legal point of view was that by virtue of giving birth, Marckx did not become the mother of her child, but needed to recognise and adopt her. Giving birth anonymously, which is dealt with in the French context in *Odièvre v. France*, *Kearns v. France*<sup>7</sup> and *Godelli v. Italy*<sup>8</sup>, is a reverse kind of a situation, where

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<sup>6</sup> *Giubergia and others v. Italy*, 15131/89, Commission decision of 5 March 1990 and *N.Q., M.S. and S.S. v. Italy*, 12612/86, Commission decision of 9 March 1990, discussed in Chapter 6.2.

<sup>7</sup> *Kearns v. France*, no. 35991/04, 10 January 2008.

<sup>8</sup> *Godelli v. Italy*, no. 33783/09, 25 September 2012.

the woman giving birth did not want that a legal relation is established between her and the child she gives birth to. However, the French practice of *accouchement sous X* stems from the same moral and legal tradition that made Marckx have to recognise and adopt her child: the disassociation of birth and female parentage due to the protection of family relations legitimated by marriage.

The establishment of fatherhood differs fundamentally from the establishment of motherhood, as it most commonly rests on the principle of *pater est quem nuptiae demonstrant*<sup>9</sup>, that the man married to the woman giving birth becomes the father of the child. Thus, as Carole Pateman has argued<sup>10</sup>, “paternity is a human invention” and, to a large extent, a social and legal construction. I would add that both maternity and paternity as legal relations are human inventions but structured differently, and paternity relies, in most situations that do not end up in the courts, on a relation of trust between the mother and the father as it is based on a marital assumption or an act of recognition, and, to a limited extent, is characterised by a certain degree of contractual agreement. The ways to establish paternity when children are born out of wedlock or when the marital assumption is not reliable vary from one legal system to another. So do the means for contesting this assumption, who is entitled to this contest paternity – the husband of the mother, the mother herself or a third party, the extramarital biological father, for example – and in what kind of a time frame. However, the breadth of ECHR case law on the establishment of paternity shows that disputes arise in a variety of circumstances. A dispute regarding the establishment or contestation of paternity may be brought about by a biological father against a legal father, by a legal father against the mother, by mothers wanting to establish the paternity of a child born out of wedlock or by the adult child her or himself.

Case law concerning paternity in the European Court of Human Rights forms a rather different set of data than case law concerning maternity. When cases dealing with maternity are few in numbers but dense in detail and significance, case law dealing with paternity is abundant in the numbers of relevant cases but less dense in detail and significance when it comes to individual judgements and decisions. In this study, paternity cases have been selected and analysed under two main rubrics. The first category 1) is constituted of cases where the question of status in the form of being married or not to the mother of the child affects the possibilities of establishing a legal relation between the biological father and the child. In many of these cases, there has been a strong desire from the part of the biological father to form a relation with the child or children. The second category 2) is concerned with the disavowal or establishment of paternity, and where legal time-limits and

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<sup>9</sup> Digest of Justinian, 2.4.5 “...*pater vero is est, quem nuptiae demonstrant*”, which may be translated into English as “the father indeed is declared by marriage”. Translation found in Watson (1998: 44), cited in Duggan (2014: 4, footnote 10).

<sup>10</sup> See opening quote to this chapter by Carole Pateman (1988: 35)

scientific proof in the form of DNA evidence are evaluated in a legal setting. In many of these cases, the fathers are reluctant towards establishing the relation or have died before the case has been brought up. Some of the cases in either category provide male counterparts to the case of *Marckx* and highlight the almost inexistent rights of unmarried fathers in some of the legal contexts discussed during the early decades of the ECHR litigation. Today, when the legal status of children born outside marriage has improved, unmarried paternity is seen to have a value of its own especially regarding the right of a child to know her origins and establish her or his identity. However, even though DNA testing offers near-conclusive proof of genetic relations and greater certainty on establishing legally valid relations, any proof of a family relation needs to be evaluated in the legal context to have effect, and there remains a difference between the right to know one's origins as a part of one's genealogy and identity and the right to have paternity recognised as a relation producing material effects such as the transmission of wealth.

## 5.1 SINGLE MOTHERHOOD IN *MARCKX V. BELGIUM*

The judgement of *Marckx v. Belgium* from 1979 may, in this study, be described as the “mother of all key cases”. It concerned a case where Paula Marckx, a single woman, gave birth to a child and challenged the need to establish her legal relation to the child through recognising and adopting her, which was the practice in Belgium still in the 1970s<sup>11</sup>. However, when the mother recognised and adopted her own child, this affected the child's inheritance rights, and even after becoming legally affiliated to her mother, the child remained a stranger to her mother's family members, and could not inherit them if they had not made a will in her favour. This also meant that if the mother died, her relatives could not become guardians of the child.

Michael Goldhaber, an American legal journalist who has written a popularised account of the main import of the European Court of Human Rights to human rights protection in Europe, offers a colourful account of the story behind the *Marckx* case. Paula Marckx, it appears, never was a shrinking violet: she has established herself as a household name in Belgium by working as a model, writing a novel, working as a journalist interviewing big names from Franco to Shirley MacLane, and she was the first female pilot working at Antwerp airport<sup>12</sup>. (Goldhaber 2007.) Goldhaber reports that Paula Marckx first wrote to Strasbourg in her own name, but received a reply saying that she had no standing in the case as her rights as a mother had not been violated

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<sup>11</sup> In the eyes of the Napoleonic code and legal systems modelled upon it such as in Belgium, ‘illegitimate’ children had the status of a foundling, regardless of the physical relationship to the mother. See Lasok (1996).

<sup>12</sup> For more biographical details, see Paula Marckx's biography, published in English in 2010 (Marckx 2010).

(2007: 17). She rewrote the complaint in the name of her child, and leaked the letter to a fellow journalist. The letter made headlines: “*Je suis un bébé et je porte plainte...*” (“I am a baby and I make a case...”). In September 1974, the complaint was deemed admissible. Leonora Van Look, a family law research assistant at the Catholic University of Louvain and an acquaintance of an acquaintance of Paula Marckx, began to help her with the legal paperwork and soon became her legal representative. In July 1976 they went to Strasbourg to be heard at the European Commission of Human Rights, at the time the first instance of the ECHR machinery. This was Van Look’s first court case, and this was the first time a female lawyer presented a case in the system of the European Court. According to Goldhaber, who interviewed Paula and Alexandra Marckx and Van Look, there was widespread support for the *Marckx* case from people involved in the process and from the media as well as individual decision-makers, such as Leona Detiege, a single mother and an alderman who later became Antwerp’s mayor. (Goldhaber 2007: 18-9.)

When looking at the documents available from the European Court, the Marckx saga is revealed in a more legal and technical manner, but this does not make the narrative any less fascinating. Paula Marckx began her legal process by lodging a complaint against the Belgian state in March 1974 on behalf of herself and her daughter who she had given birth to in October 1973. She reported the birth to her local registration officer, as was required at the time by the Belgian Civil Code concerning children born to unmarried women. Soon after reporting the birth, Marckx was summoned by a District Judge in Antwerp to appear in court to be informed about the “methods available for recognising her daughter”<sup>13</sup>. Three days later she recognised her child as stipulated by the Belgian Civil Code. A year later, in October 1974 she adopted her daughter as required by Belgian law. Certain kinds of enquiries had to be made within the procedure and some expenses were incurred in the process, which was concluded almost six months later in April 1975, when a judgement confirming the adoption was delivered. However, the decision was retroactive so Marckx was the guardian of her daughter from the date of adoption.

In the admissibility decision for the case from 1975 (a document preceding the judgement which declares the case worthy of legal proceedings in the European Court), the Belgian government argued in favour of maintaining a close link between family and legitimate marriage: “[T]he main aim [was] to protect legitimate families and encourage marriage. It would be illogical to attempt to encourage marriage and at the same time put children born out of wedlock on exactly the same footing as legitimate children”<sup>14</sup>. Due to this, the procedure for creating a recognised family relation between the unmarried mother and her child was quite detailed:

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<sup>13</sup> *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, paragraph 9.

<sup>14</sup> *Marckx v. Belgium*, 6833/74, Commission decision of 29 September 1975 on the admissibility of the application, p. 127-128.



*The applicant acknowledges that under Belgian law there is one way of increasing an illegitimate child's rights, namely adoption. She states that she has just adopted her daughter, for which she had to apply to a notary and spend 4,500 Belgian francs (roughly 550 French francs) to set proceedings in motion, although many unmarried mothers are in financial straits. The police then made enquiries of her neighbours; enquiries of this nature might damage the prospects of improving an illegitimate child's legal status by adoption, for instance as a result of the neighbours' prejudices against unmarried mothers. Moreover, she had to go to a police station to fill in a questionnaire which included the question "Why do you want to adopt the child?". The police also inspected her flat and investigated her financial situation. The applicant considers that such an investigation might perhaps be justified in the case of a person wishing to adopt someone else's child but that it is scarcely appropriate that it should be made by the police.*

Marckx v. Belgium, *Commission decision*, p. 129

The quote above illustrates that the process of adoption between an unmarried mother and her child was by no means a simple formality: the amount of work required by both the mother and the authorities in the process indicates that the aim of the legislation was indeed to discourage births outside marriage and to regulate the conduct of unmarried women if they happened to give birth to children out of wedlock. In short, if an unmarried woman gave birth to a child, her fitness to be a legal parent had to be evaluated. The Commission report on the case<sup>15</sup> sheds even more light on the details of the case. The police asked her neighbours' opinion on her "maternal qualities"; she was summoned to the police station and asked questions on her private life, such as her motives to adopt the child, and the police visited her home to obtain information on her accommodation and income.<sup>16</sup>

Marckx and her daughter argued their case in Strasbourg by claiming that Belgian legislation concerning children born out of wedlock "violated the family life of the child because it hinders the establishment of legal relations between the mother and the natural child"<sup>17</sup>. Further, they argued that legislation that aims to protect family life must promote the establishment of legal relation based on blood, because "... this solution corresponds to the truth. Indeed, maternity, be it legitimate or natural, is a fact subject to direct

<sup>15</sup> *Marckx v. Belgium*, no. 6833/74, report of the Commission.

<sup>16</sup> "Sa vie privée a été l'objet de plusieurs enquêtes: la police a interrogé ses voisins pour demander leur opinion sur les "qualités maternelles" de la requérante; elle a été convoquée au commissariat de police pour être interrogée sur sa vie privée, entre autre sur ses motifs d'adopter son propre enfant; la police a effectué une visite à domicile pour demander des renseignements sur ses conditions de logement et ses revenus." *Marckx*, report of the Commission, para 50.

<sup>17</sup> "... la législation belge porte atteinte à la vie familiale de l'enfant puisqu'elle entrave l'établissement de liens juridiques entre la mère et l'enfant naturel". *Marckx*, report of the Commission, para 22.

proof”<sup>18</sup>. The Belgian Government argued that leaving the mother free to decide whether or not to recognise her child was favourable to the child being adopted by prospective adoptive parents. In opposition to this, the applicants argued that the birth mother could not really remain anonymous as according to Belgian law the name of the mother must be mentioned on the birth certificate<sup>19</sup>. The Government also argued in formalised ECHR language that maintaining the existing treatment of children born to unmarried mothers was necessary in a democratic society, as it had as its aim to promote marriage and the so-called ‘legitimate family’.<sup>20</sup>

The Government of Belgium admitted that the “legislative dispositions [concerning the establishment of filiation] date from the introduction of *Code Napoléon* in 1804 and [had] not been modified since, even though on many other points the legal situation of natural children has been subject to legislative improvements”<sup>21</sup>. The Government further argued that not all unmarried mothers were as eager as Paula Marckx to take up their role as mothers: “If a mother is not married, it is by no means certain that she will be able to assume, alone and without the support of a man who has committed himself to it, the burdens of maternity”<sup>22</sup>. Later on, it complemented this by arguing that under article 203 of the Belgian Civil Code, upon marriage spouses enter into a contractual relation to feed, maintain and raise their children<sup>23</sup>. The Belgian Government made reference to the French practice of anonymous birth, reminding that a woman can conceal her identity when giving birth. In contrast, in Belgian law, “the medical secret has to yield before the legal obligation to record the identity of the mother”<sup>24</sup>. Thus, it was argued by the Government that this way the liberty of the woman to assume or not to assume her maternity is respected.

In the mindset of the State that had not substantially modified its law on filiation since the dawn of the Napoleonic Code, a birth outside marriage was to be understood as a mishap, accident or the result of irresponsible behaviour.

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<sup>18</sup> *Marckx v. Belgium*, report of the Commission, para 22.

<sup>19</sup> *Marckx v. Belgium*, report of the Commission.

<sup>20</sup> “... cette ingérence est actuellement nécessaire dans une société démocratique à la protection de la morale, de l’ordre et des libertés d’autrui, puisqu’elle aurait pour but de promouvoir le mariage et la famille dite légitime”. *Marckx v. Belgium*, report of the Commission, para 29.

<sup>21</sup> “Ces dispositions législatives datent de l’introduction, en 1804, du Code Napoléon et n’ont jusqu’à présent pas été modifiées, même si, sur plusieurs autres points, la situation juridique des enfants naturels a fait l’objet d’améliorations législatives”. *Marckx v. Belgium*, report of the Commission, para 31.

<sup>22</sup> “Si la mère n’est pas mariée il n’est pas du tout certain qu’elle sera disposée à assumer, seule et sans le concours d’un homme qui s’est engagé, les charges de la maternité”. *Marckx v. Belgium*, report of the Commission, para 33.

<sup>23</sup> *Marckx v. Belgium*, report of the Commission, para 41.

<sup>24</sup> “... [le] secret médical doit céder devant l’obligation légale de divulguer l’identité de la mère”, *Marckx v. Belgium*, report of the Commission, para 33.

An unmarried woman was not seen as a fully competent parental subject and could not be assumed to bear a direct legal relation of responsibility to her child, as without the material and moral support of a husband, she could not be expected to offer a decent future for her child. If she expressed her wish to become the legal parent of her child, she became a full parent.<sup>25</sup> However, the child remained a legal stranger to her or his maternal family members: grandparents, aunts, uncles and so on. In fact, the Government argued that the only difference in treatment between legitimate and adoptive children was that the adopted child did not acquire inheritance rights towards the relatives of the adoptive parents; this was because the relatives might be opposed to the adoption<sup>26</sup>.

In her complaint to the European Court, *Marckx* evoked Article 8 (the right to respect for private and family life, the home and correspondence) and 14 (the prohibition of discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status). She evoked Article 14 in conjunction with Article 8 with respect to discrimination “between ‘legitimate’ and ‘illegitimate’ children and between unmarried and married mothers”<sup>27</sup>. When the case was heard in the European Court, the representative of the Belgian Government contended that the “issues raised by the applicants [were] essentially theoretical in their case” and that since the adoption of the child born by her mother in October 1974, her “position vis-à-vis her mother has been the same as that of a ‘legitimate’ child”<sup>28</sup>. The judges of the European Court did not agree with the submission of the Belgian Government. Regarding the merits of the case, the Court held that “Article 8... makes no distinction between the ‘legitimate’ and the ‘illegitimate’ family”<sup>29</sup>. Furthermore, the Court noted that a resolution from 1970 of the “Committee of Ministers of the Council of Europe regards the single woman and her child as one form of family no less than others”<sup>30</sup>.

Thus, the Court referred to a resolution adopted by an intergovernmental body of the Council of Europe, the institution behind the Convention and the Court, in order to justify its view. Actually, Belgium had signed the international Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children prepared by the International Commission on Civil Status which entered into force on 23rd April 1964, but had not ratified it yet at the time when the *Marckx* case was in the Belgian legal system. The Council of Europe concluded its Convention on the Legal Status

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<sup>25</sup> “... la tutelle lui appartient en plein droit”. *Marckx v. Belgium*, report of the Commission, para 41.

<sup>26</sup> *Marckx v. Belgium* (judgment 1979), para 56.

<sup>27</sup> *Marckx v. Belgium*, 13 June 1979, Series A no. 31 (judgment), para 22.

<sup>28</sup> *Marckx v. Belgium*, judgment, para 26.

<sup>29</sup> *Marckx v. Belgium*, judgment, para 31.

<sup>30</sup> *Marckx v. Belgium*, judgment, para 31.

of Children born out of Wedlock on 15th October 1975, and it entered into force on 11th August 1978. However, at the time Belgium had not signed or ratified this treaty. Nevertheless, a Bill was submitted to the Belgian parliament on 15th February 1978 which was to establish the principle of *mater semper certa est* in the Belgian Civil Code and place 'illegitimate' and 'legitimate' children on the same footing in the face of law.

In its decision, the Court held that there had been a breach of Article 8 with respect to both Paula Marckx and her daughter in establishing her daughter's maternal affiliation and that there had also been a breach of Article 14 taken in conjunction with Article 8 with respect to both applicants. It also held, in addition to a variety of legal considerations raised in the case, that there had also been breaches of Article 14 in conjunction with Article 8 as to the extent in law of the child's family relationships and the patrimonial rights relied on by both her and her mother. In its decision, the Court relied on the facts of the present case but also on intertextual references made to a resolution by the Council of Ministers. The *Marckx* case also laid an important precedent regarding unmarried mothers and the legal rights of children born out of wedlock, and thus constitutes a text which is referred to often in the subsequent case law of the European Court.

The case illustrates how the principle of *mater semper certa est* is actually no more 'natural' or immediate than the legal assumption of paternity, as it is a socio-legal construct in the same way as other legal principles. In this case, the adoption of the child born by her birth mother constituted a legal fiction that turned the biological link between the child and the mother into a legally recognisable relation. The *Marckx* case demonstrates the constructedness of legal mother-child relations: the mere fact of birth does not make a mother, but the registration of the birth in her name. Since the judgement of *Marckx v. Belgium* in 1979, the marital status of the mother does not affect the certainty of motherhood in ECHR case law, so this judgement gave a final confirmation to the principle of *mater semper certa est* in European human rights law. However, some legal scholars seem to disagree, to a certain extent, on whether this principle is in use in France and Belgium. In an introductory article to a volume dedicated to explore the relationship between legal, biological and social relations in determining parentage, the Ingeborg Schwenzer is of the opinion that

*Most legal systems still firmly base the law concerning motherhood on the principle of mater semper certa est, namely that the woman who gives birth to the child is his or her legal mother. France and some legal systems closely affiliated to France, however, do not follow this principle. In these systems, a woman only becomes the legal mother of a child either by designation in the record of birth [reference is made to Belgium], by acknowledging him or her, or by virtue of the so-called possession d'état, or the lived-out mother-child relationship.*

*Ingeborg Schwenzer (2007: 3-4)*

In contrast, in an article in the same volume concerning Belgium, Gerd Verschelden (2007: 64) argues that in Belgium, it is obligatory to mention the name of the mother on the birth certificate in order to establish maternal filiation. This legal obligation was created in 1987 when the Belgian legislator thus accommodated the requirements of the judgement of *Marckx v. Belgium* from 1979.

What might explain this divergence in views concerning the applicability of *mater semper certa est*? As Schwenzer mentions following the passage quoted above, France also recognises anonymous birth, which is another way of weakening the ‘certainty’ of motherhood at birth. However, what seems to be important here is which way the assumption of motherhood goes: if the woman giving birth to the child is *assumed* to be the mother, the technicalities of birth registration are secondary. What constituted the root of the problem in *Marckx* was that due to her marital status, the biological relation of Paula Marckx to her child was unrecognised, despite the labour (pun intended) involved. However, the views of Schwenzer (2007) and Verschelden (2007) show how differently the applicability of the certainty of motherhood can be viewed.

## 5.2 ANONYMOUS BIRTH, ADOPTION AND CONCEALED ORIGINS

In *Odièvre v. France*<sup>31</sup> from 2003, a key case concerning anonymous birth where an adult woman born through anonymous birth (*accouchement sous X*) sought the possibility to find out the identity of her biological parents and siblings, the European Court of Human Rights decided in favour of the French government, ruling that retaining identifying information on her birth mother and biological kin did not violate her right to respect for private life under Article 8 of the European Convention. Ten years later, in *Godelli v. Italy*<sup>32</sup>, a similar case as it also involved an adult woman seeking for information on her origins, the European Court decided in favour of the applicant. However, in *Godelli* it was explicitly stated that the difference in the outcomes of these cases did not stem from a change in principle towards the practice of anonymous birth, a reality in both countries still today, but from the difference in the availability of non-identifying information on the birth mother to adults born through anonymous birth<sup>33</sup>.

A biographical account, a book called *De mère inconnue* (“Of an Unknown Mother”), has been written about Odièvre’s legal battle in the European Court (Mendehlsion and Marchand 2004). This book describes Odièvre as a modest, timid and frail young woman who had suffered from long-standing anguish

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<sup>31</sup> *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III.

<sup>32</sup> *Godelli v. Italy*, no. 33783/09, 25 September 2012.

<sup>33</sup> *Godelli v. Italy*, para 52.

and psychological distress during her life. In this biographical account, much of her anguish and distress is attributed to her knowing that she was an adopted child. The book was written by Didier Mendehlsion, Odièvre's lawyer, and Isabelle Marchand, a journalist involved in the process. The voice of the narrator is that of Mendehlsion, who relates the story of Odièvre and her legal battle as well as contributions of various professional and academic commentators to the debate concerning anonymous birth. The book is an easy-to-read and popularised account of the life of Odièvre and the reception of her case in the European Court. Several associations, NGOs and experts are strongly of the opinion that anonymous birth should be suppressed<sup>34</sup>, and advocacy against the practice of anonymous birth is ongoing. From the point of view of these actors, the outcome of *Odièvre v. France* was disappointing; after all, a Grand Chamber judgement was given in the case, and the with ten votes against seven, the Court found that there had been no breach of Article 8 or Article 14 taken in conjunction with Article 8<sup>35</sup>.

France has the longest and most consistent history in the practice of anonymous birth which is known also as *accouchement sous X*, "birth under X". This refers to the practice of marking the folder of a child born anonymously with an X in maternity wards. (Mendehlsion and Marchand 2004.) The applicant in the case, Pascale Odièvre, was born in 1965. Her mother, a woman unable to take care of her child due to her financial situation and the refusal of her partner, the father of the child, requested that the birth be kept secret. The child was placed with the Child Welfare Service at the Health and Social Services Department (DASS) and remained in the care of the *département* of Seine until 1969, when an adoption order in favour of Mr and Mrs Odièvre was made when the child was four years old. In 1990, when Ms Odièvre was 25 years old, she was able to consult her file and some non-identifying information on her biological parents and siblings. Details of the possible abandonment and the biological parents' "physical appearance, mental outlook, health, social background and occupation"<sup>36</sup> were gathered by the authorities in order to facilitate the placement of the child, and were kept on file.

Odièvre found out from her files that her biological parents had been cohabiting for several years in modest circumstances. Ms Berthe (a fictitious name appearing in the documents), the biological mother, was not in paid employment. The father worked as a painter and decorator. He was married to another woman and had a daughter born in wedlock taken care of by her mother. Ms Berthe and her companion had one child, a son born in 1963 who was less than two years older than Odièvre. Odièvre's biological father refused to take on the new child and Ms Berthe was willing to follow his wish. Odièvre also learned that her biological parents had two other sons after her own birth

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<sup>34</sup> See Irène Théry's recommendations in Théry (1998).

<sup>35</sup> *Odièvre v. France*, para 56.

<sup>36</sup> *Odièvre v. France*, para 12.

in 1965 who had also been “born under X”. The DASS refused to release information on her biological brothers as it would have been a breach of confidence under French law. In 1998 Ms Odièvre began her legal process against the French authorities by applying to the Paris *tribunal de grande instance* to seek an order for the release of information concerning her birth and copies of any relevant documents. She received a reply from the tribunal saying that she should apply to an administrative court in order to obtain an order for the release of the information she sought, but that this would be in conflict with French law on the matter.

In the ECHR admissibility decision, the French Government accused her of not exhausting national remedies in the case, but the complaint was declared admissible. Ms Odièvre complained to the European Court that “she was unable to obtain identifying information about her natural family and had thereby been prevented from finding out her personal history”<sup>37</sup>. She evoked Article 8 of the Convention, arguing that “[e]stablishing her basic identity was an integral part of not only her ‘private life’, but also of her ‘family life’ with her natural family, with whom she hoped to establish emotional ties were she not prevented from doing so by French law”<sup>38</sup>. Ms Odièvre and her lawyer thus tried to push the limits of ‘family life’ under the Convention to cover legally unestablished links with her biological parents and siblings. The French Government refuted this claim and said that “only the applicant’s family life with her adoptive parents could come within the scope of Article 8” as the applicant had never met her biological mother and she had never expressed any interest in establishing a link between them. The European Court considered the applicant’s claim from the perspective of private life, as it did not consider her relationship with her adoptive parents but the circumstances in which she was born and the identity of her biological parents and brothers. In its judgement, the European Court accorded a wide margin of appreciation to France in protecting the identity of women giving birth anonymously and found that Ms Odièvre’s right to respect for family life had not been violated.

The outcome of the case shows that when it comes to the notion of family life in the European Court, legal relations are supreme to other forms of relations. The notion of private life does not rest so heavily on intersections of interpersonal relations – it encompasses an individual’s identity and personal development. However, the privacy of the birth mother and the ‘natural family’ of the abandoned child went before the ‘need to know’ of the child. Judging by the history of the practice of anonymous birth, its *raison d’être* seems to have been the privacy of the woman deciding to give up her child, as the reasons for giving the child away may be resulting from difficult and distressing situations: young age, abandonment by the biological father, extreme poverty, adultery and, in some cases, even rape or incest. The legal tie between a mother and a

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<sup>37</sup> *Odièvre v. France*, para 24. The expression of ‘natural’ family relations in the case material refer simply to births outside marriage and ensuing biological relations.

<sup>38</sup> *Odièvre v. France*, para 25.

child is thus not created by the mere fact of birth, but also by the willingness of the birth mother to take on the status of maternity towards a child. On the other hand, questions of class should not be overlooked: for the State, anonymous birth also paves the way to transfer children from the 'undeserving' poor to 'deserving' adoptive parents, whose status is protected by keeping certain information undisclosed.<sup>39</sup>

In the judgement of *Kearns v. France* from 2008<sup>40</sup>, an Irish woman who had gone to France to give birth in order to benefit from *accouchement sous X* sought to reverse her decision and re-obtain the child she had given birth to. Kearns was a married woman living in Ireland who had had an extramarital relationship and wanted first to give the child up for adoption. However, she later hoped to reverse her decision when she said she had convinced her husband to recognise the child. The biological father, also joined in the proceedings and wanted to obtain custody of the child. In February 2002 Kearns went to a hospital in Northern France with her mother and a French lawyer and requested to give birth anonymously. Ten days later she gave birth to child. On the day after the birth, she had an interview with the social services with her mother and a nurse acting as an interpreter. On the same day she signed a document which placed the child in the care of the French State. She also stated that the child was born outside marriage and was not recognised by a father. In the documentation, the reasons for the placement were to be kept secret from the child until she reached majority and would be able to obtain non-identifying information of her origins. When signing the appropriate paperwork, Kearns was given a period of two months to change her mind about the adoption. The relevant legislation (348-3 of the French Civil Code) also gave a six-month time limit for the reversal of the adoption for the second parent if he did not entrust the child to the State authorities. However, this applied only if paternity had been established, and in *accouchement sous X* neither maternity nor paternity is established. Kearns also signed a separate deed for consenting to the future adoption.<sup>41</sup>

The child was placed in the care of adoptive parents in 2002. Sometime during the first half of 2002, the child's biological father learned about the birth and brought action in Ireland for the recognition of his rights over the child. In decisions given in July and August a Circuit Family Court in Ireland announced that the adoption process in France should not proceed further. Kearns went to France in late July 2002 to the hospital in which she gave birth and to the local social services and requested that the child be returned to her.

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<sup>39</sup> This resonates with a view expressed by Cadco (*Coordination des actions pour le droit à la connaissance des origines*), an organisation lobbying for the right to origins, according to which expressed a view cited in the book that the law concerning anonymous births (*loi Mattei*) was made for adoptive parents and that it protects their interests first and foremost (Mendehelson and Marchand 2004: 87).

<sup>40</sup> *Kearns v. France*, judgment no. 35991/04, 10 January 2008.

<sup>41</sup> *Kearns v. France*, paras 7-15.



The social services refused, as the two-month time limit applying to her had passed. Kearns applied to the Lille *tribunal de grande instance* and sought that the adoption decision be annulled. She submitted that she had acted under family pressure and that she had not fully understood the procedure as she did not speak French. The biological father also intervened in the proceedings.<sup>42</sup> The first instance of the French judicial system did not rule in Kearns' favour. She appealed to the Court of Appeal, which ruled, in turn, that the adoption should be reversed and the child returned to Kearns. The main premise for the decision was that despite the information given to her, she had been under the impression that a six-month time limit applied to both her and the biological father. The prefect of the *département du Nord* complained against this decision to the Court of Cassation, arguing that a child who had not been recognised by her mother could be taken into State care without her consent. The Court of Cassation quashed and annulled the Court of Appeal's judgement and put an end to the dispute.<sup>43</sup> The Court of Cassation ruled that the Court of Appeal had not properly applied the provision of the Social Action and Families Code which "provides that children whose parentage has not been established or is unknown and who have been entrusted to the Child Welfare Service for more than two months are deemed to have been taken into State care"<sup>44</sup>.

In her submission to the European Court in 2004, Kearns said that her right to respect for private and family life under Article 8 of the Convention had been breached. The biological father also intervened as a third party, submitting that "his intention had always been to be a good father to his daughter and to look after her, but that the French authorities' interference had prevented him from having a normal family life with her"<sup>45</sup>. The Court considered, without further elaboration, that the relationship between the applicant and her child came within the sphere of family life. In its reasoning, the Court aligned the substance of the case with that of *Odièvre*: "... the Court observes that it is confronted in the present case with interests that are not easily reconciled: those of the biological mother, the child and the adoptive family. There is also a general interest at stake... In striking a balance between these different interests, the child's best interests should be paramount." The 'general interest' the Court refers to is spelled out in *Odièvre v. France*:

*There is also a general interest at stake, as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value*

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<sup>42</sup> *Kearns v. France*, paras 16-20.

<sup>43</sup> *Kearns v. France*, paras 21-26.

<sup>44</sup> Court of Cassation judgment, cited in *Kearns v. France*, para 25.

<sup>45</sup> *Kearns v. France*, para 71.

*guaranteed by the Convention, is thus one of the aims pursued by the French system.*

Odièvre v. France, para 45

The possibility of anonymous birth as a question of ‘general interest’ might seem somewhat outdated in today’s Europe. However, it has been strongly favoured in many predominantly Catholic European jurisdictions that have an uneasy relationship with abortion. The “right to respect for life” is framed as a reason for the institution of anonymous birth. What is interesting is that the mother-child bond amounts to family life even in the context of anonymous birth. As we saw in *Odièvre*, the relationship of a child given away in *accouchement sous X* to her biological mother did not amount to family life. An explanation for this asymmetry could be that the birth mother is faced with the dilemma of giving the child away and keeping it: birth mothers retain the possibility of affirming the mother-child bond; they can opt in for the *mater semper certa est* principle. The child, in all her or his incapacity as a newborn infant, is subject to the protection of the State and the legal, legitimate family she is made part of.

The case was not ruled in favour of Kearns by the European Court, which places it in line with *Odièvre* and the supremacy of the legitimate (biological or adoptive) family. The act of incorporating a child legally into an adoptive family is so robust that a violation of Article 8 has seldom been found in such cases. In the judgement of *Keegan v. Ireland*<sup>46</sup> from 1994 a violation of the rights of the biological father of a child given to adoption was found. This case presented a situation where the biological father had no rights over a child who was born as a result of a relationship and subsequent cohabitation after the relationship with the mother had broken down. However, the emphasis in this case was on the non-existent rights of fathers of children born out of wedlock in Irish law prior to this judgement from the European Court.

Eva Steiner, a French legal scholar working in England, describes the practice of anonymous birth as deeply intertwined with different phases of French political and legal history and with a specific conception of parenthood based on choice. Steiner notes that

*... the procedure of accouchement sous X in France has stood the test of time through completely different ages and political cultures, and has left its mark in an enduring legacy expressed currently in its modern form in the Civil Code. Given the elevated status and authority accorded by the French people to their Civil code, often described as the true Constitution of France, one could even argue that the right mothers have to give birth anonymously under Article 341-1 of the code amounts today to a quasi-constitutional right.*

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<sup>46</sup> *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290.

She argues that the concept of parenthood in French family law is based on “an adult-centred individualistic philosophy of freedom of choice” in which “parenthood is perceived as a set of duties that parents are free to take upon themselves if they so wish” (2003: 430). According to Steiner, before the recent amendments to French laws on filiation, parenthood outside marriage did not follow from the mere fact of birth, but had to be formally acknowledged (in the spirit of the Napoleonic Code). Since July 2006, the law on filiation in France has stipulated that a woman giving birth to a child outside marriage is designated as her mother by entering her name to the birth certificate. Fathers need to recognise the child, but this can happen before birth, on the birth certificate (*acte de naissance*) or at a later point in time. Steiner explains this philosophy of parenthood by a long-standing distrust of French legal thinking towards children born out of wedlock. She argues that as making wills is not general practice in France, one’s status as a recognised child is very important in matters of inheritance which rest, for the most part, on intestate succession. Thus, for the sake of the protection of assets and property, marriage-based family relations have been key in the succession of property from one generation to another, and establishment of legal parentage has historically been made very difficult for children born outside marriage. (Steiner 2003.)

What emerges from the debates on *accouchement sous X* is that there are two ways of looking at the practice of anonymous birth from the point of view of the pregnant woman. The first one stresses autonomy and liberty of choice, which offers the woman the possibility to reject maternity. If a woman gets pregnant, she is not ‘doomed’ to unwanted motherhood, as she can exercise her liberty to give the baby away. According to Lefaucheur (2004: 331) this stance has been backed up by feminist arguments in the French context and can be characterised as a form of post-conception autonomy in the form of delayed abortion. Obviously, most of these arguments apply to abortion as well in States where women can have abortion on demand, i.e. because they do not want to carry a pregnancy to term. However, this view ignores the relationship of anonymous birth has with the disassociation of the act of birth and maternity which can be seen in *Marckx v. Belgium* and the close history anonymous birth shares with the treatment of illegitimate births in the Napoleonic Code.

From a more sceptical viewpoint, one can argue that the possibility of anonymous birth actually curtails the autonomy and subjectivity of women as reproductive agents and possible parents – even if a woman gives birth, she is not regarded as a legal, responsible parent unless she has entered or enters into a contractual relation where she expresses her willingness to take up a parental role. This contractual relation is established either vis-à-vis the father of the child and the State in cases of marriage, joint parental authority or recognition, or vis-à-vis only the State when the father is unknown or the relationship with him has not been established through recognition or a

paternity suit. Thus, the promise of liberty and autonomy offered by this particular way of arguing for it seems as false – if the *mater semper certa est* principle is not applied, women are in some ways treated as incomplete legal subjects who cannot be presumed to act as responsible adults and parents.

A much earlier decision of *X. against the United Kingdom*<sup>47</sup> in 1977 displayed a situation that was similar to Kearns. Interestingly, the complaint concerned a young French woman living in France who went to the United Kingdom to give birth and to give the baby away. She got pregnant when she was eighteen years old. The relationship with the father of the child broke down before she could tell him about the pregnancy, as he died in an accident a month later. Due to lack of resources and fearing disapproval from her family, X. wished to have an abortion. She contacted an abortion clinic in London. The pregnancy was too advanced for abortion, so the doctor proposed a caesarean section and giving the child up for adoption. After the birth, the child was given to a married couple, two doctors, of whom the wife gave up her job in order to take care of the child.<sup>48</sup> The caesarean section produced after-effects, and the applicant had to have her uterus ablated a few months later. As her hopes of future pregnancies ended, she refused to give her formal consent to the adoption. The adoptive parents began legal proceedings against X. In February 1976, when the child was two years old, the High Court of justice pronounced the adoption. This was following the Adoption Act from 1958, which allows the adoption to be pronounced without the consent of the birth mother “if the refusal does not seem reasonable”<sup>49</sup>.

In her complaint to the European Court, X maintained that pronouncing the adoption against her will violated her right to respect for family life under Article 8. The British Government argued that domestic remedies had not been exhausted, and that X “should have claimed effective custody of the child before the judgement ordering the adoption”<sup>50</sup>. However, the Commission did not pay much attention to this as the application was inadmissible for a different reason. Referring to *Marckx* and some other decisions, the Commission reiterated that “the relations between a child born out of wedlock and its natural parents are covered by the concept of ‘family life’”<sup>51</sup>. In the case at hand, X had handed her child over for adoption at the moment she gave birth. As the Commission noted, “[b]y virtue of her own decision there was no family life between herself and her son during the first months”<sup>52</sup>. When she desired to take her child back, the possibility had been taken away by a court decision.

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<sup>47</sup> *X. v. the United Kingdom*, no. 7626/76, Commission decision of 11 July 1977.

<sup>48</sup> *X. against the United Kingdom*, p. 164-165.

<sup>49</sup> *X. against the United Kingdom*, p. 165

<sup>50</sup> *X. against the United Kingdom*, p. 165

<sup>51</sup> *X. against the United Kingdom*, p. 166.

<sup>52</sup> *X. against the United Kingdom*, p. 166.

Both in the Adoption Act 1958 of the United Kingdom and Article 10 of the European Convention on Adoption, supposed to articulate principles common to the Member States of the Council of Europe, family rights and obligations are terminated between the birth parents and the child when the adoption is pronounced. In the case material, the pronounced adoption was characterised as “a specific act of interference of a particularly serious nature”<sup>53</sup>. Article 8 does not oblige the State to restore family life when it has been disturbed by the actions of the persons involved, but it does afford protection against actions of public authorities that make resuming family life impossible. In the case at hand, X’s conduct had led to the actions of the public authorities. However, according to the case material, it is a “generally accepted principle in the field of adoption [that it] must not be ordered without the mother’s consent”<sup>54</sup> and that this consent could be overruled only in exceptional circumstances determined by law. According to Article 5 (2) of the European convention on Adoption the mother’s consent cannot be overruled “save on exceptional grounds determined by law” and the Adoption Act 1958 in the United Kingdom gave an exhaustive list of such situations, of which one was the refusal of the mother being “unreasonable”.<sup>55</sup>

In the light of these parameters, the Commission was faced with the following question: “After living for two years in its adopted family was the child’s interest in being adopted both from the point of view of breaking its links with its mother and that of consolidating its links with the adopters already so clear that the adoption should be ordered against the mother’s will thus destroying all possibility of family life between her and the child?”<sup>56</sup> It is mentioned in the case material that the Commission had at its disposal “all the evidence carefully collected by the court”<sup>57</sup>. Interestingly, the evidence quoted “conclusions reached by the psychiatrists called by both sides, all of whom stated there was a danger of short or long term negative effects on the development of the child’s personality if it came back to live.. with its mother”<sup>58</sup>. The Commission came to the conclusion that to “protect the health and overriding interests of the child” it had to hold up the adoption. The complaint was declared manifestly ill-founded and declared inadmissible.<sup>59</sup> As a decision in the ECHR system, *X. against the United Kingdom* is an early precursor of *Kearns v. France*, as it confirms the primacy of adoptive relations once they have been established.

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<sup>53</sup> *X. against the United Kingdom*, p. 166.

<sup>54</sup> *X. against the United Kingdom*, p. 166.

<sup>55</sup> *X. against the United Kingdom*, p. 166.

<sup>56</sup> *X. against the United Kingdom*, p. 167.

<sup>57</sup> *X. against the United Kingdom*, p. 167.

<sup>58</sup> *X. against the United Kingdom*, p. 167.

<sup>59</sup> *X. against the United Kingdom*, p. 167-168.

### 5.3 NATURE, NURTURE OR STATUS? FATHERS SEEKING RECOGNITION

Case law concerning the constitution of fatherhood as a parental relation in the European Court of Human Rights is vast if all complaints relating to paternity, right of access of fathers to their children and custody battles are taken together. In this and the following sub-chapter, I wish to concentrate on judgements that focus on how paternity as a legal relation is constituted in European human rights jurisprudence. The first set of cases dealing with a willingness and a desire to establish a relation of paternal filiation are discussed in this sub-chapter, and they offer descriptions of rather clear conflicts of biological paternity against legal paternity. The latter set of cases discussed in the following sub-chapter (5.4) deal with rejection of paternity by presumed fathers, established according to a legal assumption or following a paternity suit initiated by the mother of the child or the child herself. The historical shift in the certainty of biological fatherhood due to the emergence of genetic (DNA) testing has in many ways re-structured the field of constituting paternity. However, as the case law illustrates, paternity cannot be solely reduced to a genetic tie, as other considerations may play a part as legal authority reserves the supreme right to decide otherwise. In any case, DNA testing has in many ways “biologised” (Machado 2008) paternity, perhaps leaving less influence to other considerations which in the absence of DNA testing have led to also misattributing paternity.

The judgement of *Johnston and others v. Ireland* from 1986<sup>60</sup> has been presented by Meulders-Klein (1996: 492) as a kind of a male counterpart to the *Marckx* case, as it establishes the right of the child born outside marriage to establish maternal and paternal ties with her parents. The applicants were a cohabiting couple and their child. Mr Johnston got married in 1952. In 1965, Mr Johnston and his wife began to live in separate parts of the family home. Mr Johnston had been living with Ms W. for seven years when they had a child in 1978. According to the case material, Mr Johnston was named as the father of the child in the Register of Births. Mr and Mrs Johnston were unable to divorce under the Irish legislation in force at the time, but Mr Johnston had made arrangements to the benefit of Ms W. and their daughter. In front of the Commission on Human Rights, Mr Johnston, Ms W. and their child complained of the “absence of provision in Ireland for divorce and for recognition of family life of persons who, after the breakdown of marriage of one of them, are living in a family relationship outside marriage”<sup>61</sup>. The Court held “unanimously that the legal situation of the third applicant under Irish law gives rise to a violation of Article 8 (art. 8) as regards all three

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<sup>60</sup> *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112, discussed also in Chapter 4.2. The Johnston case is also relevant to the privatisation of dyadic relationships between adults and Théry’s (1993) *démariage* thesis, even though it did not recognise a right to divorce *per se*.

<sup>61</sup> *Johnston and others v. Ireland*, para 38.

applicants”<sup>62</sup>. In contrast, it did not find a violation of Article 8 or Article 12 due to the absence of divorce in Irish legislation and the resultant inability of Mr Johnston and Ms W to marry.<sup>63</sup>

The inadmissibility decision of *B., R. and J. against the Federal Republic of Germany* from 1984<sup>64</sup> is also closely linked to the *Marckx* case in relation to the status of children born outside marriage. The decision shows how the status of unmarried mothers and fathers was by no means symmetrical. In the case, R., B. and J., their child, lived together. R., the unmarried father of J., complained that there was no way for him to jointly exercise the care and custody of J. except marrying B., the mother of J. According to relevant legislation at the time (Section 1705 BGB), all other forms of recognising J., namely a declaration of legitimacy (*Ehelicherklärung*), adoption or appointment as guardian (*Vormund*) meant that the mother lost the right to care and custody of the child. When the applicants argued their case in the European Court, they referred to *Marckx v. Belgium* in their defence:

*The applicants point out that in the Marckx judgement, the Court, on the one hand, recognised that support and encouragement of the traditional family was in itself legitimate or even praiseworthy, but, on the other hand, the court underlined that, in the achievement of this end, recourse must not be had to measures the object or result of which was to prejudice the “illegitimate” family. In their opinion the freedom of the individual to marry or not to marry is curtailed by the legal situation complained of because, in order to obtain the joint right to care and custody of his child, an unmarried father has no other choice than to marry the mother of his child.*

*B., R. and J. against the Federal Republic of Germany, p. 138*

The Government of the then FRG argued that “non-conjugal partnerships differ so much from marriage, with its legal conditions and effects, that a different regulation of the right to care and custody is absolutely necessary”<sup>65</sup>. By this, the Government referred to the presumed more frugal nature of ‘non-conjugal partnerships’, i.e. unmarried cohabitation or similar arrangements. Interestingly, the Government referred to demographic data from a source it left unidentified: “...the number of non-conjugal partnerships is increasing, but according to studies so far available on this subject, only about 26% of these partnerships exist for more than three years, and, in any event, their duration is very rarely longer than half a childhood”<sup>66</sup>. The

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<sup>62</sup> *Johnston and others v. Ireland*, para 86.

<sup>63</sup> *Johnston and others v. Ireland*, para 86.

<sup>64</sup> *B., R. and J. against the Federal Republic of Germany*, no. 9639/82, Commission decision of 15 March 1984.

<sup>65</sup> *B., R. and J. against the Federal Republic of Germany*, p. 138.

<sup>66</sup> *B., R. and J. against the Federal Republic of Germany*, p. 137.

applicants refuted the Government's claims of demographic developments by pointing out that "the present legal situation with regard to children born out of wedlock [is not] based on extensive examinations and research... the legislator mainly considered statistics from the statistical yearbook of the Federal Republic"<sup>67</sup>. This critique from the applicants is indeed noteworthy, as in this and other instances of referring to extra-legal scientific or academic knowledge the information referred to is usually rather commonplace, even superficial<sup>68</sup>.

When declaring the application inadmissible, the Commission on Human Rights stated that it

*...finds that the special situation of the child born out of wedlock is an objective and reasonable justification for the German legislator's decision to confer the right of care and custody with regard to a child born out of wedlock exclusively to the mother instead of to both parents, even if they live together. The fact that some States may have regulated the problem in a different manner does not contradict this finding, as it is in the national legislator's discretion to choose between several possible solutions to a problem, as long as the regulation chosen respects the obligations undertaken by the ratification of the Convention.*

B., R. and J. against the Federal Republic of Germany, p. 142

The European Commission of Human Rights declared this complaint inadmissible, leaving it to the discretion of the Member State to decide whether the parent-child bond between an unmarried father and child needed to be recognised. In the decision, the respondent Government argues "...R. is not prevented from actually living together with his child and the child's mother. The law merely denies him the legal position of a person having the care and custody, following the applicant R.'s decision not to formalise his relations with the mother"<sup>69</sup>. The comment of the Commission resonates with the judgement of *X., Y. and Z. v. the United Kingdom* from 1997<sup>70</sup>, where the representative of the British Government "pointed out that the applicants were not restrained in any way from living together as a 'family' and they asserted that the concerns expressed by them were highly theoretical"<sup>71</sup>. The case concerned a post-transition female-to-male transgender person, his female partner and their child conceived by artificial insemination. Obviously, the

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<sup>67</sup> B., R. and J. against the Federal Republic of Germany, p. 138.

<sup>68</sup> On extra-legal knowledge applied in ECHR case law, see discussion of *Jolie v. Belgium* (this sub-chapter) and *X, Y and Z v. the United Kingdom* (chapter 6.3).

<sup>69</sup> B., R. and J. against the Federal Republic of Germany, p. 137.

<sup>70</sup> *X, Y and Z v. the United Kingdom*, no. 21830/93, 22 April 1997, Reports of Judgments and Decisions 1997-II.

<sup>71</sup> *X, Y and Z v. the United Kingdom*, para 46, discussed in Chapter 6.3.



Governments in ECHR cases need to construct their arguments to defend their positions, but this has been a form of argument found in several cases indeed<sup>72</sup>.

The decision of *Jolie v. Belgium* from 1986<sup>73</sup> offers similar setting of unmarried family life. A child had been born to a woman who was still officially married albeit separated from her husband. She sought a divorce and the husband brought a case disclaiming paternity of the child which went through. However, due to Belgian legislation at the time, this left the child as an *enfant adultérin*, a child born of an adulterous relationship, and his biological father was unable to recognise him as he had been born within 300 days of the divorce, a time limit that the marital assumption of paternity covered. The mother and the biological father had another child as well born later, and recognising this child born out of an unmarried and not an “adulterous” relationship, which was possible, would have left the two children in very different positions vis-à-vis their biological and social father<sup>74</sup>. The complaint was deemed admissible by the Commission, but was not heard by the European Court as a friendly settlement was reached because Belgian legislation was altered in 1987 to conform to the standards required by the case of *Marckx v. Belgium*, judged already in 1979<sup>75</sup>. What is notable in the complaint was the applicants tried to evoke textbook-level anthropological expertise in order to argue that they form a family:

*Related persons living under one roof, and specifically a father, mother and children, constitute a family in the accepted sense of the term. According to this definition, the three applicants form a family based on consanguinity and thus on a non-marital union. The term "kinship" covers all those social relationships resulting from consanguinity or marriage.*<sup>76</sup>

*Jolie v. Belgium, Commission decision, p. 253*

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<sup>72</sup> See also *Chavdarov v. Bulgaria*, paras 49 and 56.

<sup>73</sup> *Jolie v. Belgium*, no. 11418/85, Commission decision 14 May 1986. See also *Jolie et Lebrun contre la Belgique*, no. 11418/85, Rapport de la Commission, 8 October 1987 (friendly settlement).

<sup>74</sup> *Jolie v. Belgium*, Commission decision, p. 252-253.

<sup>75</sup> *Jolie et Lebrun contre la Belgique*, no. 11418/85, Rapport de la Commission, 8 October 1987 (friendly settlement).

<sup>76</sup> The passage referred to is from an introductory textbook to anthropology: "La parenté est l'ensemble des relations sociales qui résultent de la consanguinité (réelle ou simplement affirmée), ou de l'alliance par mariage. On sait, depuis Morgan, que les relations de parenté et les usages qui les accompagnent obéissent à un ordre interne. C'est pourquoi les anthropologues parlent de systèmes de parenté. Ces systèmes de parenté sont de nature sociale et non biologique: sont parents dans une société donnée, ceux qui se considèrent comme tels, que cela coïncide ou non avec la réalité biologique. Tout se passe comme si l'homme, pour résoudre les problèmes qui se posent à lui, avait mis un certain ordre dans ses relations avec ses semblables, en les classant. Parents, alliés et étrangers sont départagés" (Colley 1979: 63).

Consanguinity is offered here as the basis of relatedness, together with being members of the same household. The expert knowledge offered is of a rudimentary kind, cited from an introductory textbook to social anthropology (see Colley 1979: 63).

*Keegan v. Ireland* from 1994<sup>77</sup> is one of the clearest examples and a key judgement among the case law of the European Court of Human Rights on how the position of unmarried fathers has been, in the recent history of some jurisdictions, much weaker than the unmarried mother such as in *Marckx v. Belgium*. In *Keegan*, a man and a woman had been in a relationship and cohabiting for about a year, and they agreed to try to have a child together. They got engaged, too, whilst cohabiting but separated soon after the engagement. However, later in the same year the woman gave birth to a child. Whilst pregnant, the woman arranged to give the child up for adoption, of which the father was informed with a letter after the birth of the child. According to the law in place in the Republic of Ireland at the time, an unmarried man could be the guardian of his child only if the court had appointed him as such. Keegan instituted proceedings to be appointed the guardian of the child and to obtain custody<sup>78</sup>. The first instance court, the Circuit Court decided in favour of him, awarding him guardianship and custody<sup>79</sup>.

The mother of the child and the prospective adoptive parents appealed against him, and the second instance, the High Court, saw no reason for denying his rights as a father. The mother and the prospective adoptive parents obtained an opinion from the Supreme Court, the highest instance, which sent the case back to the High Court. The Supreme Court judge interpreted the legislation in place to refer merely to the possibility of obtaining guardianship<sup>80</sup>. The High Court re-examined the case, and, among other considerations, heard evidence from an expert witness, “a consultant child psychiatrist who considered that the child would suffer short-term trauma if moved to the applicant’s custody. In the longer term she would be more vulnerable to stress and be less able to cope with it. She would also have difficulty in forming “trust” relationships”<sup>81</sup>. By this time, the child was already more than a year old and had been placed with the prospective adoptive parents.<sup>82</sup>

The Supreme Court judge, Justice Barron, reflected on the significance of issues related to social class such as the socio-economic standing of the adoptive parents and presumed future scholarly achievement of the child as beneficial factors, but noted that they were not conclusive:

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<sup>77</sup> *Keegan v. Ireland*, no. 16969/90, 26 May 1994, Series A no. 290, paras 6-8.

<sup>78</sup> *Keegan v. Ireland*, paras 6-8.

<sup>79</sup> *Keegan v. Ireland*, para 9.

<sup>80</sup> *Keegan v. Ireland*, paras 10-12.

<sup>81</sup> *Keegan v. Ireland*, para 13.

<sup>82</sup> *Keegan v. Ireland*, paras 6-7.

*...if the child remained with the adopters she would obtain the benefit of a higher standard of living and would be likely to remain at school longer. However, [Justice Barron] considered that differences springing solely from socio-economic causes should not be taken into account where one of the claimants is a natural parent. In his view "to do otherwise would be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law".*

Keegan v. Ireland, para 14

However, reflecting on this matter highlights the possibility that the prospective adoptive parents were of a different stratum of society or otherwise in a disposition that differed from the socio-economic situation of the father. Justice Barron concluded as follows:

*If the child remains where she is, she will if the adoption procedures are completed become a member of a family recognised by the Constitution and freed from the danger of psychological trauma [caused by potential separation from the foster parents]. On the other hand if she is moved she will not be a member of such a family and in the short and long term her future is likely to be very different. The security of knowing herself to be a member of a loving and caring family would be lost. If moved, she will I am sure be a member of a loving and caring unit equivalent to a family in her eyes.*

Keegan v. Ireland, para 14

Thus, socio-economic standing and presumed scholarly achievement are reflected upon but dismissed as evoking them in the final argumentation would be arguing against the (rather theoretical, it seems) equality before the law of all Irish citizens. However, the most central argument in deciding between giving both guardianship and custody to a biological parent or foster parents, not removing the child from the circumstances and the affective family relations that she had already been able to form was preceded by the privilege of being able to live and be part of a “family recognised by the [Irish] Constitution”<sup>83</sup>. Here we can see that the definition of family in the Constitution of the Republic Ireland, so close to the definition of family in the Universal Declaration of Human Rights (see Chapters 2.1-2.2), has indeed been put to work on the ground level and not just in theoretico-political discourse.

In his submission to the European Court, Keegan evoked, Article 8, and complained that

*...to be consistent with Article 8 (art. 8) the law ought to have conferred on him a defeasible right to guardianship and, in any competition for*

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<sup>83</sup> See previous quote.

*custody with strangers, there ought to have existed a rebuttable legal presumption that the child's welfare was best served by being in his care and custody. He stressed, however, that he was not seeking to overturn the adoption order that had been made in respect of his child.*

Keegan v. Ireland, para 46

So, in the European Court, Keegan wished to challenge the constitutional impossibility created by the interpretation of the Supreme Court<sup>84</sup> of an unmarried biological father to have legal standing in the process leading to a child being adopted by third parties. The European Court wanted to distinguish the adoption process from the guardianship and custody proceedings, and argued that the crux of the matter in the case was that the child was placed for adoption after birth without the knowledge and consent of the biological father, and that he had no legal standing in how the adoption proceeded. Thus, as his only recourse was a time-consuming legal process for guardianship and custody, by the end of the process the child had already bonded with the prospective adoptive parents taking care of the child.<sup>85</sup>

The European Court ruled that Article 8 and Article 6 (para 1) had been violated: Keegan's right to respect for family life and right to a fair trial had not been protected. As to the notion of family life, the Court noted that:

*For both the applicant and the Commission<sup>86</sup>, on the other hand, his links with the child were sufficient to establish family life. They stressed that his daughter was the fruit of a planned decision taken in the context of a loving relationship. The Court recalls that the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage... A child born out of such a relationship is ipso iure part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended.*

Keegan v. Ireland, paras 43-44

The latter part of this passage has been a widely cited piece of ECHR case law, placing *de facto* family ties in the hierarchy of different kinds of family relations in ECHR case law.

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<sup>84</sup> Keegan v. Ireland, para 39.

<sup>85</sup> Keegan v. Ireland, para 59.

<sup>86</sup> "Commission" refers to the Commission of Human Rights, a screening body that existed in the ECHR system at the time.

The judgement of *Kroon and others v. the Netherlands* delivered in 1994<sup>87</sup>, in turn, offers an example of a case where the assumption of paternity within marriage was in clear contrast with biological and social relations, but with no legal possibility to re-assign paternity. The complaint was lodged against the Netherlands in 1991 by Kroon, her partner Z., and S., a child born of their relationship. In 1979, Kroon had married a man called D. The marriage disintegrated the following year, and Kroon and her husband lost contact. According to official records, D. “left Amsterdam in January 1986 and his whereabouts have remained unknown ever since”<sup>88</sup>. The third applicant, the child, was born in October 1987 out of the relationship between Kroon and Z. However, in the register of births he was named as the child of Kroon and D. Kroon began proceedings to divorce D. one month after S. was born. The divorce went through unchallenged. Kroon and Z. requested the Amsterdam registrar in 1988 to enable Z. to recognise him as his son. The registrar refused the request. S. had been born when Kroon was still married to D., and the registrar was unable to fulfil the request of Kroon and Z. under Dutch law if D. did not return and bring proceedings to deny his paternity of S.

Kroon and Z. filed a complaint in the Amsterdam Regional Court complaining that while it was possible for the legal father of a child born in wedlock to deny his paternity, the mother was not able to deny that her former husband was the father of her child. The Regional Court refused their request in 1989, saying that

*In spite of the justified wish of Mrs Kroon and Mr [Z.] to have biological realities officially recognised, their request had to be refused since, under the law as it stood, [S.] was the legitimate child of Mr [D.]. There were only limited exceptions to the rule that the husband of the mother was presumed to be the father of a child born in wedlock.*

*Kroon and Others v. the Netherlands, para 11*

After the judgement of the Regional Court, Kroon and Z. appealed to the Amsterdam Court of Appeal, which said that Article 8 applied but that there had been no violation of it. The applicants took the case to the Supreme Court, which agreed with the Court of Appeal that solving the problem at hand and developing the law was not within the powers of the judiciary. The European Court found that “family life” existed between Z. and S., partly because three other children had been born to Kroon and Z. (whom he had recognised) and Z. contributed to the upkeep of his children even though the parents did not live together. The Court found that Article 8 was applicable and that there had been a violation of Article 8, stating that “in the Court’s opinion, ‘respect’ for ‘family life’ requires that biological and social reality prevail over a legal

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<sup>87</sup> *Kroon and Others v. the Netherlands*, no. 18535/91, judgment of 27 October 1994, Series A no. 297-C.

<sup>88</sup> *Kroon and Others v. the Netherlands*, para 11.

presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone”<sup>89</sup>. It is perhaps here in *Kroon* that the dissection of biological, legal and social relations is most aptly illustrated, and how the marital assumption of paternity may have far-reaching implications.

In a more recent case of *Chavdarov v. Bulgaria* from 2010<sup>90</sup> a man had entered into a relationship with a woman who was still married to another man. The man and the woman had three children together, but the estranged husband of the woman was named as the father on the birth certificates of these children. The mother left the family when all the children were still underage and the man stayed with the children, residing with them and taking day-to-day care of them. He consulted a lawyer in order to be able to establish himself as the legal father of the children, but this was legally impossible apart from seeking to adopt the children. Compared to all the other cases where the European Court has strongly argued in favour of the combination of social and biological relations over merely legal relations, it is peculiar that a violation of Article 8 was not found in *Chavdarov*. Both the Bulgarian Government and the European Court dwelt on the fact that the mother and her husband had not opened legal proceedings for the disavowal of paternity. It was also pointed out by the European Court more than once in the text of the case, in a highly neutralised tone, that no one had interfered in or laid obstacles to the biologically-social father and the children living together<sup>91</sup>. The case shows that in the context of a biological and social father taking care of his children, the system might privilege the marital assumption so far that adoption is offered as a possibility, almost like in *Marckx v. Belgium*. As to living together with no interference, the same kind of rhetoric surfaces in the argumentation of the British Government in *X, Y and Z v. the United Kingdom*<sup>92</sup>. In both cases, individuals sharing close personal relations were free to live together as they pleased according to their Governments, and the European Court did not, due to technical and legal obstacles, grasp the opportunity to amend the legal relations in question to correspond to social reality.

## 5.4 REJECTION OF PATERNITY AND SIGNIFICANCE OF DNA TESTING

Fatherhood is not always a desired state of affairs. There is a wealth of judgements and decisions in the case law of the European Court of Human

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<sup>89</sup> *Kroon and Others v. the Netherlands*, para 40.

<sup>90</sup> *Chavdarov v. Bulgaria*, no. 3465/03, 21 December 2010.

<sup>91</sup> *Chavdarov v. Bulgaria*, paras 49 and 56.

<sup>92</sup> See *X, Y and Z v. the United Kingdom*, para 46: “The Government pointed out that the applicants were not restrained in any way from living together as a “family” and they asserted that the concerns expressed by them were highly theoretical”.

Rights where presumed and probable fathers avoid the law, or use the possibilities that law offers to undo paternity attributed through marriage, recognition or a court decision. In the case of maternity, the rejection of motherhood is structured differently than in paternity, but as the practice of anonymous birth demonstrates, the identity of the birth mother may be effectively concealed with the help of the state. The judgement of *Rasmussen v. Denmark* from 1984<sup>93</sup> is an important judgement in weighing the concept of equality between men and women in the attribution of filiation. In the case, a husband and wife who had two children, divorced. The man had doubts about whether he was the father of the younger child, but did not try to institute paternity proceedings within the time-limit set by Danish law at the time due to an agreement with his ex-wife that she would waive rights to maintenance and he would refrain from a legal case rebutting his paternity of the younger child.

In the European Court, he

*... complained of the fact that... his right to contest his paternity of a child born during the marriage was subject to time-limits, whereas his former wife was entitled to institute paternity proceedings at any time. He alleged that he had been the victim of discrimination on the ground of sex, contrary to Article 14 of the Convention, taken in conjunction with Article 6 (art. 14+6) (right to a fair trial, including the right of access to court) and with Article 8 (art. 14+8) (right to respect for private and family life).*

*Rasmussen v. Denmark, para 27*

The European Court found no violation of these Articles, as it left a wide margin of appreciation to the Danish Government. The Court argued that the existence of time limits for opening paternity proceedings could be backed up with the need to support legal certainty and to safeguard the interests of the child in question. Denmark was in no way an exception in this regard compared to other Member States of the Council of Europe. Furthermore, it was elaborated by the European Court that the time limits benefited the wives because a mother's interests often coincided with the interests of the child, women ending up as the custodians in most situations of separation or divorce.<sup>94</sup> However, the existence of strict time-bars has since been condemned by the European Court, for example, in the case fathers rejecting maritally attributed paternity such as in *Mizzi v. Malta*<sup>95</sup> as well as in many judgements concerning the right of children seeking knowledge of their paternity.

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<sup>93</sup> *Rasmussen v. Denmark*, no. 8777/79, 28 November 1984, Series A no. 87.

<sup>94</sup> *Rasmussen v. Denmark*, para 41.

<sup>95</sup> *Mizzi v. Malta*, no. 26111/02, ECHR-2006 (extracts), para 10.

*Shofman v. Russia* from 2006<sup>96</sup> concerned a situation in many ways like *Rasmussen*, but the father only became aware of the possibility that the child born in wedlock might not be his biological child at the time of divorce when the time-limit for contesting paternity had run out. DNA testing offered proof that he was not the father of the child. The European Court found a violation in this case, arguing that

*According to the Court's case-law, the situation in which a legal presumption is allowed to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective "respect" for private and family life... The Court considers that the fact that the applicant was prevented from disclaiming paternity because he did not discover that he might not be the father until more than a year after he learnt of the registration of the birth was not proportionate to the legitimate aims pursued. It follows that a fair balance has not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence.*

*Shofman v. Russia, paras 44-45*

Thus, the existence of the possibility of finding genetic evidence made a difference and should have been given a chance, even though the child had been benefiting of a paternal relationship. In a concurring opinion in the case material, Judge Lorenzen of the European Court reminds that

*The assessment of to what extent and under what conditions a registered paternity may be contested is very difficult involving a number of conflicting interests. Thus the "biological reality" is only one of them, and it may in the circumstances of a given case be outweighed by for instance the interests of the child, the child's mother or the society in preserving the stability of the legal status of persons...*

*Shofman v. Russia, concurring opinion of Judge Lorenzen*

The judgement of *Mizzi v. Malta* from 2006<sup>97</sup> involved the case of a man who claimed the assumption of fatherhood within marriage had worked against him, as he suspected and later confirmed that he was not the father of a child born to his wife when he was still married to her. The complaint was made against the state of Malta in 2002 when Mizzi was in his sixties and his presumed daughter was an adult. Four years after getting married Mizzi and his wife ceased to live together. Four months later X gave birth to Y. Mizzi had

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<sup>96</sup> *Shofman v. Russia*, no. 74826/01, 24 November 2005.

<sup>97</sup> *Mizzi v. Malta*, no. 26111/02, ECHR-2006 (extracts), para 10



suspicious that Y might not be his child and wanted to carry out blood tests. X refused to have a blood test carried out, which intensified Mizzi's suspicions that he was not Y's biological father. However, a test would not have been of much help as Maltese law at the time did not allow a man in his circumstances to challenge the legal assumption of fatherhood. He was registered as the legal father under the assumption that he was Y's biological father. Mizzi and his wife soon separated legally and a few years later the marriage was annulled by the Vatican. Y contacted him after 1993 and said she wanted to carry out a blood test. Tests were carried out in Switzerland and they proved that Mizzi was not Y's biological father. Mizzi began a legal process in 1996 in the Civil Court in order to establish that he had a right to bring action in order to disavow his paternity of Y<sup>98</sup>.

As Mizzi and his wife had been cohabiting at the time when Y was conceived and he had been aware of her birth, he could not have challenged the legal assumption of fatherhood under relevant Maltese law at the time. The Maltese Civil Code in force in 1967 allowed the paternity of a child born in wedlock to be challenged if cohabitation by the couple at the time of conception had been physically impossible, if they had been legally separated, or if the birth had been concealed from the husband, when he was allowed to repudiate the child on the basis of adultery. The Civil Code was amended in 1993, after which adultery was an accepted reason for a husband to repudiate a child if he produced further evidence, such as scientific tests, and acted within six months of the birth<sup>99</sup>. In the European Court, Mizzi complained that the legal presumption of him being the father of the child violated his rights to respect for private and family life under Article 8 of the ECHR. In addition, he complained about the absence of a possibility to challenge his paternity earlier within the Maltese legal system. In its final judgement, the Court concluded that there had been a violation of Article 14 taken in conjunction with Article 8.

Legal time-bars for establishing paternity were the bone of contention in a number of judgements given concerning Finland in 2010<sup>100</sup> and 2013<sup>101</sup>. From the 1920s onwards, Finnish paternity legislation allowed recognition of paternity by the father for children born out of wedlock, but paternity could not be established if the presumed father was against it. In 1975, new paternity legislation was enacted in order to ameliorate the legal status of children born out of wedlock. However, strict time limits were instituted so that children born before the entry into force of the Act on 1 October 1976 had to institute paternity proceedings within five years of this date, after that they were not

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<sup>98</sup> *Mizzi v. Malta*, paras 9-14.

<sup>99</sup> *Mizzi v. Malta*, paras 15-27.

<sup>100</sup> *Grönmark v. Finland*, no. 17038/04, 6 July 2010, *Backlund v. Finland*, no. 36498/05, 6 July 2010.

<sup>101</sup> *Laakso v. Finland*, no. 7361/05, §15 January 2013, *Röman v. Finland*, no. 13072/05, 29 January 2013.

covered by the legislation. Also, if the presumed father was dead, paternity proceedings could not be instituted by the presumed child. The European Court eventually declared this rigid time-limit as a violation of Article 8 in *Grönmark v. Finland* and *Backlund v. Finland*, decided on the same day in 2010<sup>102</sup>. This was a considerable step in protecting the right to identifying information on one's origins and for equality between persons born in and out of wedlock. Several complaints were taken as far as the ECHR as many persons in Finland were affected by this legislation and often these cases involved financial interests in possibly inheriting the presumed fathers.

*Mikulić v. Croatia* from 2002<sup>103</sup> is often cited in legal literature as an important case in the area of attributing paternity. Its main import was in the ineffectiveness of the Croatian authorities to procedurally determine the paternity: the putative father was unwilling to cooperate, and failed to attend court sessions and DNA testing opportunities on several occasions. In the end, his unwillingness to submit himself to a DNA test was taken as a sign of his probable genetic paternity. In the judgement of *A.M.M. v. Romania* from 2012<sup>104</sup> as well a violation of Article 8 was found as the Romanian authorities in question had acted ineffectively in order to carry out the judicial procedure concerning a child's right to have her paternity established. The problems in the case arose from the lack of sufficient proof to actually determine the paternity, but the main crux of the matter was that the right and the interest of the child to know her origins was not protected well enough by the domestic authorities as the presumed father was not pursued effectively enough to conclude on the matter. The description of possible forms of proof paints a picture of the variety of proof that may be produced to support a paternity claim in the jurisdiction in question, Romania: testimonials, documents, the testimonial of the defendant party to the paternity claim, presumption and scientific proof<sup>105</sup>.

In *Jäggi v. Switzerland* from 2006<sup>106</sup> the applicant was a person in his 60s who wished to have his putative father's physical remains disinterred from a grave in order to carry out a DNA test. He complained to the European Court that the refusal of the Swiss authorities to allow this constituted a violation of Article 8, arguing that "the right to know one's parentage lay at the heart of the right to respect for private life"<sup>107</sup>. It was specifically asserted in the case that "the proceedings brought by the applicant were intended solely to establish the

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<sup>102</sup> *Grönmark v. Finland* and *Backlund v. Finland*.

<sup>103</sup> *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I.

<sup>104</sup> *A.M.M. v. Romania*, no. 2151/10, 14 February 2012.

<sup>105</sup> *A.M.M. v. Romania*, para 49

<sup>106</sup> *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X. The issue of wishing to discover one's genetic paternity at a later age has also surfaced in *Phinikaridou v. Cyprus*, no. 23890/02, 20 December 2007, *Brauer v. Germany*, no. 3545/04, 28 May 2009 and *Pascaud v. France*, no. 19535/08, 16 June 2011.

<sup>107</sup> *Jäggi v. Switzerland*, para 23.

biological ties between him and his putative father and did not in any way concern his inheritance rights”<sup>108</sup>. At the European Court, he complained that he had suffered a violation under Article 8 pertaining to his private life and that there had also been a violation of Article 14 in taken in conjunction with Article 8: this meant that he argued that he “had been subjected to discrimination that had not been based on objective grounds in that the Federal Court had taken into account his state of health and advanced age as reasons for justifying the refusal to perform a DNA test”<sup>109</sup> on the remains of a deceased man who was presumed to be his biological father. In its reasoning, the Court came to the conclusion that Article 8 had been violated. It argued that

*Although it is true that, as the Federal Court observed in its judgement, the applicant, now aged 67, has been able to develop his personality even in the absence of certainty as to the identity of his biological father, it must be admitted that an individual’s interest in discovering his parentage does not disappear with age, quite the reverse. Moreover, the applicant has shown a genuine interest in ascertaining his father’s identity, since he has tried throughout his life to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested.*

Jäggi v. Switzerland, para 40

The European Court also touched upon the fact that the remains would have been exhumed in a certain number of years as the lease on the grave was going to expire and that it was the applicant who had succeeded in renewing the lease of the grave. The outcome of the case goes to show that the European Court has attached great weight to the right to know one’s origins, as in this case such a right was deemed more important from the point of view of Convention rights than the right of the recognised and official close relatives of the deceased person to leave his grave untouched.

In *Kalacheva v. Russia* from 2009<sup>110</sup> the applicant was the mother of a child who had been born from a concealed relationship with a married man, A. After a court order, DNA evidence was obtained and said to prove that A. was the genetic father of Kalacheva’s daughter born in 2003. Due to procedural shortcomings in the taking of the blood test, A. was able to dispute the validity of the samples taken<sup>111</sup>. The shortcomings in the signatures attached to the samples were described by the Government:

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<sup>108</sup> *Jäggi v. Switzerland*, para 26.

<sup>109</sup> *Jäggi v. Switzerland*, para 48.

<sup>110</sup> *Kalacheva v. Russia*, no. 3451/05, 7 May 2009.

<sup>111</sup> *Kalacheva v. Russia*, paras 5-12.

*Blood sampling was conducted on... in the presence of the parties, their lawyers and four medical workers, including a person who took the samples. However, there were only two signatures on the envelopes with the samples instead of the three required; furthermore, these signatures were not decoded as there were no names or positions next to them.*

Kalacheva v. Russia, para 24

Due to these shortcomings in the samples taken by the local public bureau of forensic medical examinations, the Kirovskiy District Court of Astrakhan dismissed the evidence produced<sup>112</sup>. According to Russian law, it was the court which should have ordered a second DNA examination, but the domestic courts failed to do so<sup>113</sup>. The European Court found a violation of Article 8. The European Court reasoned that

*The Court does not lose sight of the fact that today a DNA test is the only scientific method of determining accurately the paternity of the child in question; and its probative value substantially outweighs any other evidence presented by the parties to prove or disprove the fact of an intimate relationship. Furthermore, the applicant suggested that she and the defendant had concealed their relationship; hence the genetic examination could have been the only persuasive evidence of the disputed paternity.*

Kalacheva v. Russia, para 34

Thus, the importance of DNA testing is acknowledged when the matter at hand specifically concerns the establishment of paternity as a biological relationship. Even though the applicant was the mother of the child, the interests of the child in establishing her paternity should have made the domestic courts order a second DNA test after dismissing the first one due to the argumentation of A., the presumed father. The judgement of the European Court offers both legal argumentation in favour of establishing a child's origin and the interests of the mother against the proceduro-legal stance of the presumed father and the judicial system that did not effectively seek to find an answer to the questions posed in the case.

Scientific methods providing inconclusive results such as comparing blood groups before the advent of DNA testing sometimes played a part in misattributing paternity from a genetic point of view. Such was the case of *Ostace v. Romania*<sup>114</sup> from 2014 where a legal father had been unable to reopen a case of judicially attributed paternity, judged in the early 1980s when DNA testing was not available. Due to DNA evidence obtained when the child

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<sup>112</sup> *Kalacheva v. Russia*, paras 9-11.

<sup>113</sup> *Kalacheva v. Russia*, para 36.

<sup>114</sup> *Ostace v. Romania*, no. 12547/06, 25 February 2014.

was an adult and cooperated with his father in the testing process, the genetic relation between them was disproven. In the judgement of *Tavli v. Turkey* from 2006<sup>115</sup> a man had been barred from reopening a case of misattributed paternity as the Turkish courts did not regard the later emergence of DNA testing that would have counted as a *force majeure* for not having this proof at hand in 1982. The paternity had been attributed to him by a court in 1982 due to blood group testing that showed that he could be the father, because he and his fiancée had lived together before getting married and because the child was born in wedlock. In 1997, DNA testing proved that he was not the genetic father of the child in question. In the judgement, the European Court found a violation of Article 8, noting that

*.... the fact that the applicant was prevented from disclaiming paternity, because scientific progress was not considered to be a condition for retrial... was not proportionate to the legitimate aims pursued. It follows that a fair balance has not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence... The Court is of the opinion that domestic courts should interpret the existing legislation in light of scientific progress and the social repercussions that follow.*

*Tavli v. Turkey, para 36*

Likewise, in the judgement of *Iyilik v. Turkey* from 2011<sup>116</sup>, a Turkish man was not given the possibility to re-open a case of paternity assumed on the basis of marriage where the disavowal of paternity involved blood-group testing in the 1960s. The difference to *Tavli* was that the applicant in *Iyilik* wanted his adult daughter to be obliged to undertake a DNA test so that he could find out whether or not she was his daughter. It is noted in the case material that he expressly wanted to establish this as he was writing up his will and did not want a genetically unrelated person to inherit him. The European Court did not find a violation of Article 8 and noted that despite the emergence of DNA testing and the possibility to obtain genetic proof on paternity, it had been established in ECHR case law that in order to protect third parties, such as children benefiting from a long-lasting relation of legal filiation, they could not be forced to undertake medical tests such as DNA tests<sup>117</sup>.

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<sup>115</sup> *Tavli v. Turkey*, no. 11449/02, 9 November 2006.

<sup>116</sup> *Iyilik v. Turkey*, no. 2899/05, 6 December 2011.

<sup>117</sup> *Iyilik v. Turkey*, para 33.

## 5.5 DISCUSSION: MATERNITY, PATERNITY AND INCOMMENSURABILITY

*'A new order of the European family' needs to be established around the child, with due respect for the rights of parents. The European Convention on Human Rights and the International Convention on the rights of the Child provide the framework for this. Biological parentage of a child should, under normal circumstances, go hand in hand with social and legal parentage. These three factors should only be divorced, in practical terms, if one of the parents has failed, or voluntarily consented to the child's adoption. In short, the joint responsibility of the true parents of the child should be favoured by the legal and social systems whenever possible, even in the event of separation or divorce, and even where a new 're-grouped' family is formed.*

*M.-T. Meulders-Klein (1996: 520)*

The maternity cases discussed in this chapter are the very few and important judgements in the case law of the European Court regarding the constitution and the rejection of maternal filiation. *Marckx v. Belgium* from 1979 acts as a starting point for the empirical analysis of parental relations of consanguinity and filiation in this study, as it demonstrates that not even maternity comes into existence without a pre-existing legal framework and an accepted political and legal consensus, and for this principle to be regarded as a human rights norm there has to be consensus between States, for example, in the form of intergovernmental treaties. From the point of view of the articulation of human rights in the context of parent-child relations it is a seminal case as it places children born within and outside marriage on an equal footing with regard to maternal filiation. In *Marckx v. Belgium* it was also stressed that different forms of family should be legally recognised. In many ways, *Marckx* illustrates the idea of the 'core family' of a mother and child(ren) as seen by Fineman, who argues that "the mother-child formation would be the 'natural' or core family unit – it would be the base entity around which social policy and legal rules are fashioned" (1995: 5-6). Fineman's argument is based in the Anglo-American political context of single mothers as a 'deviant' category, but this notion is useful also when applied to the legacy of *Marckx v. Belgium* and the bundle of relations that a child's parentage is built on.

The case of *Marckx* does not touch upon the paternity of the child so it engages only with certain issues, but in illustrating the historical need to recognise the capacity of birth mothers to be able to assume parenthood over their children it is vital. The essential outcome of the case, from the normative point of view, is that the marital status of the mother of a child must not act as an impediment to the establishment of officially sanctioned relations between a child – and her wider family and network of relatives through the mother. Even though most legal systems in Europe have for long been favourable to

assuming an incontestable bond between a birth mother and the child she gives birth to, the *Marckx* judgement demonstrates that even this bond is not self-evident or somehow outside the realm of administrative formalities. The case illustrates the meaning of legal fictions and rules, acts of formal recognition and the power of law in the making of maternity and officially recognised mother-child relations. To take the argument to the extreme, one could say that in the realm of parentage, nothing follows merely on the basis of nature.

*Marckx* acts as a prime example of how, from a sociological point of view, a biological and physical event such as the birth of a child is not enough to form a recognised bond within the society in question unless there are social and legal structures in place making this possible. Nedelsky's perspective (see Chapter 3.3) is also neatly applicable to *Marckx*: by restructuring, or in this case simplifying, the legal relation of a mother's entitlement to a child and a child's entitlement to her mother, a child otherwise in the situation of a foundling was able to have a full legal parent by the virtue of being born to her and not just through a cumbersome and possibly humiliating adoption process between two consanguineous persons connected corporeally and immediately by the fact of birth. The core value here could be called equality between children born in and out of wedlock and between married and unmarried mothers. This could be characterised as a relational right of offering motherhood special protection in the spirit of the social protection offered by Article 25(2) of Universal Declaration of Human Rights<sup>118</sup> in order to protect the well-being of the mother, the child and the bond that they already share due to genetic similitude, gestation and the intention of the mother.

Whereas *Marckx* was in many ways a story with a happy ending, the cases described in the second sub-chapter offer a description of the other side of rejected maternity: possible ambivalence on the part of the birth mother concerning giving the child away, and the perennial problem of the right to know one's origins. *Odièvre v. France*, *Kearns v. France* and *X. v. the United Kingdom* illustrate situations where a birth mother wants renounce her rights to the child she has given birth to, but also the problems following from these practices: in *Odièvre*, the 'right to know' of the child given for adoption as a result of anonymous birth, and in *Kearns* and *X.*, the problems associated with the desire to reverse the renouncement of maternity. In both cases, the relation between the adoptive parents and the adopted child is what prevails as the most protected form of family life.

Expecting mothers are given the possibility to benefit from the *mater semper certa est* principle, but if they opt out of it and do not claim the child back in the period granted to them by law, the State places the child in the hands of adoptive parents and makes them the legally recognised parents of the child. In the French context of anonymous birth, the privacy and secrecy

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<sup>118</sup> "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

of persons involved in is heavily protected. As the relation between the mother and the child was never affirmed, there is nothing that would link a person like Odièvre to her biological mother, or to her biological siblings with whom she wanted to establish links in search of her identity. In *Kearns*, the mother claimed that she did not have a correct impression about the period of time within which she could claim her child back, and thus tried to convince the French courts that her consent to giving the child up for adoption should be concerned invalid. In her case the legal relation between the child and her adoptive parents had already been established. In both *Odièvre* and *Kearns*, the principle of not overturning administrative decisions is given great importance. What Law has joined together, mere mortals must never separate.

*Johnston, B., R. and J. and Keegan* all illustrate the difficulties that have been in place in different European jurisdictions concerning the recognition of the potential for full parental subjectivity on unmarried men. Much in the same way as *Marckx*, they highlight the importance of recognising the potential of both unmarried men and women as relationally embedded individuals regardless of their legal status. All these complaints show the importance that status, in this case being an unmarried adult, has had in defining the possibility of becoming a legal parent to one's child. Biological parentage, maternity or paternity, was not under dispute in any of these cases, but the message was that without the legal protection and standing that marriage could give, it could be both women or men who were not seen as full parental subjects. The effect, of course, was that children were left with less protection and privileges, such as rights to be acknowledged as the immediate relative of one's mother, father or child or effects relating to the transmission of property.

As can be seen in *Odièvre*, *Godelli* and several paternity cases<sup>119</sup> described above, the desire to discover more about one's biological origins might be even more accentuated in adult age than when younger, as the European Court has noted in *Jäggi v. Switzerland*: "it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse"<sup>120</sup>. In many of the paternity cases, the European Court has offered strong protection to the right to know one's biological parentage and origins, but as seen in *Odièvre*, the legacy of the Napoleonic Code that has judged the conditionality of women as full parental subjects leaves children with little possibilities to find out enough to satisfy the will to know one's origins. From Nedelsky's perspective of restructuring relations through rights to protect the value of knowing one's origins, the solution might be further accentuating the interest of the child over the interest of the parent to remain anonymous, as for example several civil society groups and organisation in France have advocated (see Ensellem 2004).

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<sup>119</sup> *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X, *Phinikaridou v. Cyprus*, no. 23890/02, 20 December 2007, *Pascaud v. France*, no. 19535/08, 16 June 2011.

<sup>120</sup> See *Jäggi v. Switzerland*, para 40.



Iacub argues that in the process of making all children equal in their relations to their parents, the maternal womb has replaced Napoleonic marriage as the “ideal institutional matrix” (2004: 333)<sup>121</sup> and that instead of enhancing liberty and equality, the limits of constraint and inequality have merely assumed new forms of appearance. According to Iacub, the womb is no less arbitrary than marriage in demarcating the line between ‘true’ and ‘fictitious’ filiation: according to her, moralism concerning the family has not disappeared; it has just changed location (2004: 335). Taking the maternal womb as the point of reference in determining filiation has not made men and women equal in matters of procreation. Iacub argues in several passages of *L’Empire du ventre* that in the current system of positive and negative rights of procreation women have become the “sole masters of procreation”<sup>122</sup> (2004: 338) – women have the ultimate right to decide, once pregnant, whether a child will be born or not, and whether they will keep the child or give it away for adoption, regardless of whether anonymous birth is available in a given jurisdiction or not. Furthermore, Iacub argues that the former inequalities between married and unmarried women have been replaced with inequalities between fertile and infertile women.

Iacub presents interesting points, but in her ultra-liberal ethos she seems to dismiss some important points of consideration. In her argumentation, Iacub presents a sharp division between ‘real’ and ‘fictitious’ filiation which does not seem to hold: she contrasts mothers who have given birth and become ‘real’ mothers in the spirit of *mater semper certa est* and mothers who have resorted to ‘fictitious’ forms of creating ties of filiation through adoption or surrogacy arrangements. Her criticism of this divide misses its target, as adoption as a legally created and confirmed relation does not seem to be threatened by a stamp of ‘fictitious’ filiation. Judging by the relevant case law from the European Court, adoptive family relations, and legal relations within them in particular, emerge as the most valued form of family relations in situations of conflict. In Iacub’s utopia of reproduction, origins would have no importance (2004: 350). However, in real life, as for example relevant ECHR case law shows, origins matter to many people and they are willing to go to great lengths to find out more about them. Their experiences should not be overlooked, regardless of the reasons they have for an interest in knowing their origins, as not all act with a motivation related to financial gain, as the genealogical and “symbolic” relations discovered this way seem to be of importance. The question then is, how to construct a system where biological, legal, social and gendered relations would be in balance?

Iacub champions a logic of *décisions procréatives*, procreative decisions (2004: 352) where both men and women would be able to reject parenthood.

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<sup>121</sup> “En prétendant égaliser le statut de tous les enfants vis-à-vis de leurs parents, on a substitué au mariage napoléonien, en tant que matrice institutionnelle idéale, le ventre maternel” (Iacub 2004: 333).

<sup>122</sup> “... seules maîtresses de procreation”.

If a child is born who is unwanted by one or both the consanguineous parents, a man has the possibility of avoiding fatherhood on the level of social relations and everyday life. However, in the legal realm this does not really exist: if he is pursued as the father of a child, he does not really have an option of not becoming a father except when it can be proven that he is not the man to be sought. Machado (2008) has offered an analysis of the practise of Portuguese courts where, in her terms, maternity has been subject to being 'moralised' and paternity to being 'biologised'. This ties in with the debate on the importance of knowing one's origins, but this might call for further distinction on the elements of 'biologised' paternity. Undoubtedly, with the advent of scientific proof in finding out who is genetically related to whom, in many cases the simple and uncontestable scientific 'truth' may be found out. But is the focus too much on mere genetics, what about the other aspects of 'biological relations' or consanguinity? Does it count who has been intimately involved with the mother at the time of conception, or who has shared the mother's everyday life when she has been expecting the child?

Genetic relations offer an important, but by far not the only aspect of biological or consanguineous relations understood in a more comprehensive manner. DNA testing offers the possibility for finding out genetic truth, but it is not decisive in determining the existence of a legal relation between a father and a child: if enough time has passed and the child has been able to benefit from a lasting relation with a legally and socially attributed father, that is then what the relation between a father and a child rests on. Thus, a genetic relation as a marker of consanguinity lays the ground for establishing or de-establishing filiation when the foundations for this relation are still being laid. The importance given to different forms of relatedness by different parties counts, too: a child, even as an adult, cannot be obliged to undergo DNA testing, there has to be a joint interest in establishing the genetic truth between the father and the child. From a Nedelskian viewpoint, scientific proof may help in restructuring relations in the form of offering information on one's origins, which may still be completely separate to establishing legal relations with a person with whom one shares genetic substance.

## 6 FILIATION: ADOPTION AND ASSISTED PROCREATION

*Becoming nomadic unfolds by constructing communities where the notion of transience, of passing, is acknowledged in a sober secular manner that binds us to the multiple “others” in a vital web of complex inter-relation. Kinship systems and social bonding, like political agency, can be rethought differently and differentially, moving away from the blood, earth and origin of the classical social contract. A nomadic politics of becoming-minoritarian is a posthumanist, vitalist, nonunitarian, and yet accountable recomposition of a missing people.*

*Rosi Braidotti (2012: xvii)*

In this chapter, relevant case law from the European Court concerning adoption and assisted reproduction is analysed in order to see who may adopt and what kind of different forms of adoption take place, who may have access to assisted reproduction and/or the use of donated gametes and what kind of implications these types of family formation have on how family relations are seen in a European culture of human rights. Adoption and assisted reproduction are modes of creating family relations which both give rise to fervent debate on who is entitled to benefit from these practices in order to become a parent. Who, a couple or an individual, may adopt a child and create a legal relationship with her/him and in what kind of circumstances? Who may obtain access to assisted reproduction services, be they State-subsidised or not? What can and cannot be done with sperm, ova, embryos and wombs in assisted reproduction?

There is a variety of cases in the case law of the European Court that touch upon adoption in different forms. Apart from its social, everyday nature, adoption is a legal relation *par excellence*. Adoption takes many forms: full adoption or second-parent adoption by a married opposite-sex couple, which is the norm shared and held dear across Member States of the Council of Europe. Depending on the legislation in place in a given State, adoption may be open to cohabiting couples, second-parent adoption and either of these might be open to opposite-sex couples, same-sex couples or both. As noted by the 19th century scholar Henry Maine (1861), cited by David Schneider (1987: 172), adoption is an age-old, even ancient mode of constructing legally and socially binding family relations in the absence of a genetic link. It does not always concern a married opposite-sex couple adopting a child they have not known beforehand. Adoption may take place within a household when a step-parent wishes to adopt his or her spouse's or partner's child (second-parent adoption), by a single person or within an extended family.

In the first two sub-chapters, I analyse who may adopt within and according to the law of a certain State, under what conditions and to what

extent these claims can be addressed as human rights issues. Some of the judgements and decisions discussed in this chapter might involve international adoption, but the focus is on the characteristics and the evaluation of the potential adoptive parental subject and what kind of relations s/he is allowed to create. Complaints to the European Court dealing with the right to bring an internationally adopted child over a border<sup>1</sup> might be related to judgements discussed in this chapter, but they remain outside the scope of this analysis. A number of complaints may be found in the ECHR system relating to adoption or fostering within an extended family, for example between aunts or uncles and nieces or nephews<sup>2</sup>. Second-parent adoption forms an intriguing field of analysis that has been under recent scrutiny in the European Court of Human Rights especially from the point of view of same-sex couples, namely female couples. In the Grand Chamber judgement of *X. and others v. Austria* from 2013<sup>3</sup> and the judgement of *Gas and Dubois v. France* from 2012<sup>4</sup>, the key cases in this sections, this was the case, albeit with a rather different set of facts in the two cases. Obviously, second-parent adoption may be sought and takes place in a variety of contexts in which the availability of gender-neutral marriage is not the crux of the matter. The case of *Emonet v. Switzerland* from 2007<sup>5</sup> acts as an example of that.

Assisted reproduction, on the other hand, is often an extension of coital reproduction if gametes of the opposite-sex couple in question are used. The cases discussed in the last two sub-chapters concern the principles of assisted reproduction: whose cells may be used in the production of new individuals and the relations around them? How about embryos produced in the process of *in vitro* fertilisation, how may they be used? And if children are born through surrogacy arrangements, what are the legal and administrative risks related to such a process? The donation of sperm and eggs for the purposes of assisted reproduction give rise to heated debates and a variety of legislative outcomes. The use of the couple's own cells is usually seen as least problematic, but often donated sperm or eggs might be needed in order to succeed in these treatments. The use of donated sperm has been practiced or tolerated more often than the use of donated eggs, which seems to be the most difficult question and remains illegal in many European states, too.

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<sup>1</sup> See *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28 June 2007, *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, ECHR 2004-V (extracts).

<sup>2</sup> In some cases this is *kafala*, the Muslim equivalent of fostering/adoption, falling somewhat in between these two categories. However, as these complaints concern crossing borders on the basis of an existing or a disputed family relation, they fall outside the scope of this study, as international adoption, immigration, deportation and family reunification have been left out of the data (see Chapter 3.3). See judgement of *Chbihi Loudoudi and Others v. Belgium*, no. 52265/10, 16 December 2014 (not in data).

<sup>3</sup> *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013.

<sup>4</sup> *Gas and Dubois v. France*, no. 25951/07, ECHR 2012.

<sup>5</sup> *Emonet and Others v. Switzerland*, no. 39051/03, 13 December 2007.

Furthermore, the use of embryos fertilised and frozen in certain forms of treatment gives rise to moral reflection and legal problems as well. Recently in 2014, the first judgements in ECHR case law concerning the recognition of parental relations between commissioning parents and children born through surrogacy arrangements outside Europe, *Mennesson v. France*<sup>6</sup> and *Labassee v. France*<sup>7</sup>, have been given, and they are of utmost importance to an analysis of the recognition of family relations in ECHR case law.

## 6.1 WHO MAY ADOPT? SUBJECTS FIT FOR FILIATION

First I discuss two key cases relating to adoption, *Fretté v. France* from 2002<sup>8</sup> and *E.B. v. France* from 2008<sup>9</sup> which concern the possibility of single non-heterosexual people to adopt<sup>10</sup>. This is followed by other relevant ECHR case law. In recent debates concerning the possibility of same-sex marriage, the question of adoption has often been in a central position. The principle of extending the rights and benefits that marriage entails to same-sex couples very often includes the right to seek the possibility of adoption. This needs to be phrased in such a conditional manner, because what is at stake is not really a right to adopt. There may be various kinds of obstacles that couples or individuals face when wishing to adopt, as those applying for adoption go through a process of evaluation regarding their suitability as potential adoptive parents. In many countries, homosexuality has long been a categorical bar to be seen as a suitable adoptive parent. This has been ruled against in *E.B. v. France* in 2008 in the case of individuals applying as single applicants for authorisation to adopt. However, in the case of international adoption due to restrictions put in place either by the States of the prospective adoptive parents or the States where children are adopted from, there may be a variety of factors that influence the possibility to adopt, such as the age of the prospective adoptive parents, characteristics relating to their health and other factors<sup>11</sup>. These criteria may vary and are open to critical discussion, but they go to show that adoption as a whole is a field where a variety of factors influence the suitability of a given person to be regarded as a suitable adoptive parent and that rights accorded in *E.B.* refer merely to the right to be evaluated according to a fair set of criteria when applying for an adoption license.

*Fretté v. France* from 2002 and *E.B. v. France* 2008 are judgements only six years apart in time where the European Court came up with two completely

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<sup>6</sup> *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).

<sup>7</sup> *Labassee v. France*, no. 65941/11, 26 June 2014.

<sup>8</sup> *Fretté v. France*, no. 36515/97, ECHR 2002-I.

<sup>9</sup> *E.B. v. France* [GC], no. 43546/02, 22 January 2008.

<sup>10</sup> For an earlier and more detailed analysis of *Fretté v. France* and *E.B. v. France* by the author, see Hart (2009).

<sup>11</sup> See *Schwizgebel v. Switzerland*, no. 25762/07, ECHR 2010 (extracts).

opposing judgements on the suitability of non-heterosexuals as single prospective adoptive parents. In *Fretté*, a single man was denied authorisation to adopt by the French social services and administrative courts on the basis of his homosexuality<sup>12</sup>, and the European Court ruled that this was within the margin of appreciation of the State. What was perhaps most interesting in *Fretté* was how the role of scientific knowledge on the advisability of childrearing by homosexuals was presented. The French Government relied in its arguments on a precautionary principle due to the lack of scientific consensus on the matter:

*It must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date. In addition, there are wide differences in national and international opinion, not to mention the fact that there are not enough children to adopt to satisfy demand.*

Fretté v. France, para 42

In the European Court, Fretté argued that many studies had proven that views relating to the unsuitability of homosexuals as parents were unfounded:

*Through the assumption that homosexuals were less loving and attentive parents, social prejudice denied the common humanity of heterosexuals and homosexuals – although the latter had the same feelings and aptitudes. Numerous scientific studies had demonstrated the irrationality of that assumption and none had provided any evidence of the supposed “uncertainties that would affect the child’s development” if he was adopted by a homosexual – uncertainties on which the [French] Government’s argument was based.*

Fretté v. France, para 35

The debate continued a few years later in *E.B. v. France* and the judgement of *Fretté* was overturned in 2008 by the Grand Chamber of the European Court. In this case, the applicant, B., was a woman who lived together with another woman. The Grand Chamber decided that there had been a breach of Article 14 (principle of non-discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention. The Court articulated that E.B. had been discriminated against in the sphere of private life’ (Article 8) on the basis of her sexual orientation (Article 14). Thus, the issue was not seen to fall into the category of ‘family life’<sup>13</sup>. The temporal and

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<sup>12</sup> *Fretté v. France*, no. 36515/97, ECHR 2002-I.

<sup>13</sup> *E.B. v. France* [GC], no. 43546/02, 22 January 2008.

political context might have played a part in the European Court finding such a different outcome in *E.B.* than *Fretté*.

A revised version of the European Convention on the Adoption of Children was adopted by the Committee of Ministers of the Council Europe on 7th May 2008. The text of the judgement refers explicitly to the revised Convention<sup>14</sup>, which stipulates that adoption should be open to different-sex couples and single people, and that States Parties are free to extend the provision to same-sex couples as well if they choose<sup>15</sup>. In contrast to the discussion on the best interest of the potential adopted child(ren) and the role of scientific consensus on child-rearing by homosexuals in *Fretté*, in the case of *E.B.* the most considerable bone of contention was whether the difference in treatment accorded to B. compared to heterosexual single applicants was due to her particular circumstances, namely living with another woman and her partner's reported lack of interest in the adoption process when interviewed, or to a more general reluctance from the French social services as an institution to grant openly non-heterosexual persons authorisation to adopt. From a theoretical point of view, *E.B.* also contained more detectable references to the 'structuralist social contract' and the 'symbolic order' of heterosexual parenting (see Robcis 2013 and Chapter 1.2).

B. started her application process with the aim of adopting a child in 1998. She was a nursery school teacher in her late thirties and she was cohabiting with a female partner, R., a psychologist<sup>16</sup>. A report from the local social services bureau stated that the women did not "regard themselves as a couple, and R., although concerned by her partner's application to adopt a child, does not feel committed by it"<sup>17</sup>. Despite the case concerning individual adoption by B., R.'s reported detachment from the application process became a substantial factor affecting the way the case was discussed all the way up to the European Court. There were certain similarities between *Fretté* and *E.B.*: in both cases, the individual applicants were teachers and on a personal level, they were described in the case material by the evaluating authorities as having qualities that were required from an adoptive parent. In both cases, too, the 'lifestyle' of the applicant, i.e. homosexuality, became a fact that influenced the outcome of the process.

In another report given in B.'s application process for adoption, a psychologist asked "...[h]ow certain can we be that the child will find a stable and reliable paternal referent?"<sup>18</sup>, pointing out that "...[l]et us not forget that children forge their identity with an image of both parents..." and that "...all

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<sup>14</sup> European Convention on the Adoption of Children (revised), adopted in the 118th Session of the Committee of Ministers (Strasbourg, 7 May 2008).

<sup>15</sup> *E.B. v. France*, para 29.

<sup>16</sup> *E.B. v. France*, para 8.

<sup>17</sup> *E.B. v. France*, para 10.

<sup>18</sup> *E.B. v. France*, para 11.

the studies on parenthood show that a child needs both its parents”<sup>19</sup>. Another psychologist from the children’s welfare services recommended that the application should be refused because the potential adoptive child would face “a certain number of risks relating to the construction of his or her personality”<sup>20</sup>. The psychologist referred to the reluctance of B. and R. to identify as a couple and that the child would have only a maternal role model. The psychologist asked: “In the extreme, how can rejection of the male figure not amount to rejection of the child’s own image? (A child eligible for adoption has a biological father whose symbolic existence must be preserved, but will this be in [B.’s] capabilities?)”<sup>21</sup>.

After pursuing her case in the French administrative courts to the highest level, B. applied to the European Court and evoked Article 14 in conjunction with Article 8, arguing that she had been subject to discrimination which interfered with her right to respect for private life. She argued that “the opportunity or chance of applying for authorisation to adopt fell within the scope of Article 8 both with regard to ‘private life’, since it concerned the creation of a new relationship with another individual, and ‘family life’, since it was an attempt to create a family life with the child being adopted”<sup>22</sup>. In the European Court, the French Government argued that in *Fretté* the difference in treatment was based on Fretté’s homosexuality, but in B.’s case it was other factors that had led to her lack of success in the application process for adoption and in the handling of the case in the French legal system:

*... the Government pointed out that many professionals considered that a model of sexual difference was an important factor in a child’s identity and that it was perfectly understandable that the social services of the département should take into consideration the lack of markers enabling a child to construct its identity with reference to a father figure.*

*E.B. v. France, para 38*

As the debates described in Chapter 1 show, there have certainly been “many professionals” and intellectuals in France, be it practitioners, psychoanalysts, philosophers or social scientists who actively defended the ‘symbolic order’ and the French ideal of a heterosexual nuclear family as a universal, republican and psychically balanced institution (Robcis 2004, 2013). These debates are also referred to in comments submitted by Robert Wintemute, a legal scholar and activist, to the European Court in B.’s case on behalf of several non-

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<sup>19</sup> *E.B. v. France*, para 11.

<sup>20</sup> *E.B. v. France*, para 13.

<sup>21</sup> *E.B. v. France*, para 13.

<sup>22</sup> *E.B. v. France*, para 35.



governmental organisations as third-party interveners<sup>23</sup>. In the comments, it is stated that “... [t]he rigid position of French administrative officials and courts, on access by lesbian and gay individuals to individual adoption, is probably a result... of the influence of a branch of French psychoanalytic theory which believes that a child must have maternal and paternal references in the home in order to construct its psychological identity” (Wintemute 2005: para 32). Furthermore, the case material in *E.B.* reads that “with regard to the ground based on the lack of a paternal referent, [B.] argued that while the majority of French psychoanalysts believed that a child needed a dual maternal and paternal referent, there was no empirical evidence for that belief and it had been disputed by many other psychotherapists.”<sup>24</sup> Lack of ‘scientific consensus’, or any consensus for that matter, seems to cut both ways and to be a lasting state of affairs.

When ruling on the case, the European Court found that Article 14 applied in conjunction with Article 8, or that the Articles on the prohibition of discrimination and on respect for private and family life were applicable to the case. Regarding to the two main points made by the French Government to justify why B. was refused an adoption licence, the Court scrutinised the requirement of a ‘paternal referent’ more critically: “In the Court’s view, [this] ground might... have led to an arbitrary refusal and have served as a pretext for rejecting the applicant’s application on grounds of her homosexuality”<sup>25</sup>. Moreover, the Court observed that “these two main grounds form part of an overall assessment of the applicant’s situation. For this reason, the Court considers that they should not be considered alternatively, but concurrently. Consequently, the illegitimacy of one of the grounds has the effect of contaminating the entire decision”<sup>26</sup>. This ‘contamination theory’ was seen as a very contentious legal argument, and the dissenting judges are very critical of it in their dissenting opinions.<sup>27</sup>

The judgement of *Schwizgebel v. Switzerland* from 2010<sup>28</sup> comes somewhat close to *Fretté* and *E.B.* in the sense that it concerned a single woman wishing to adopt who was barred by the relevant authorities to adopt a second child after she had been successful in adopting one child through international adoption. In her case, it was mainly her age that acted as an obstacle to the proposed adoption of a second child. However, in the material

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<sup>23</sup> This is also called an *amicus curiae* brief (comments by a third party admitted by the Court to enlighten the issue at hand) by FIDH (*Federation Internationale des Droits de l’Homme*), ILGA-Europe (International Lesbian and Gay Association), APGL (*Association des Parents et futurs parents gays et lesbiens*), BAAF (British Association for Adoption and Fostering). See Wintemute (2005).

<sup>24</sup> *E.B. v. France*, para 54.

<sup>25</sup> *E.B. v. France*, p. 22, para 73.

<sup>26</sup> *E.B. v. France*, p. 24, para 80.

<sup>27</sup> *E.B. v. France*, dissenting opinions of Judge Zupančič and Judge Loucaides.

<sup>28</sup> *Schwizgebel v. Switzerland*, no. 25762/07, ECHR 2010 (extracts).

cited in the case, it emerges that her specific circumstances as an adoptive parent played a role as well:

*[The] Court of Justice for the Canton of Geneva... did not call into question the fact that the applicant's educational qualities, based on love, respect and Christian values, were recognised. Moreover, the court considered that the applicant had sufficient resources as a result of her salaried jobs. It took the view, however, that the adoption of a second child could unfairly affect the situation of [the first adopted child]. Moreover, it found that the applicant had underestimated the specific difficulties of adoption, and in particular international adoption.*

Schwizgebel v. Switzerland, para 19

Schwizgebel complained to the European Court that she had been discriminated against because of her age under Article 14 taken in conjunction with Article 8 and that “claimed to be a victim of discrimination in relation to women who could nowadays have biological children at that age”<sup>29</sup>. The European Court found no violation of the rights evoked, as it unanimously considered the issue of age-limits regarding adoption to be within the margin of appreciation of the State.

A decision further back in time, *Di Lazzaro against Italy* from 1997<sup>30</sup>, also concerned the possibility of single people to adopt. Di Lazzaro complained of the fact that single people were not allowed to adopt in Italy on a par with married couples, despite Italy being party to the adoption convention of the Council of Europe from 1967. Adoption by single people was possible if a married couple who had applied to adopt were hit by separation or death of the other spouse, if a single person sought to adopt a child to whom s/he was related up to the sixth degree and in cases involving seriously ill or disabled children. The Italian courts involved in the process were unanimously of the opinion that being party to the Convention on adoption meant that it opened the possibility for Italian legislators to make adoption possible for single people, but that they were not obliged to place (married) couples and single people in the same position vis-à-vis adoption. The European Commission on Human Rights also rejected the application as inadmissible.

Likewise, the inadmissibility decision of *Lang-Lüssi against Switzerland* from 1995<sup>31</sup> concerned a couple who had been able to adopt a child from Brazil and have the adoption authorised by Brazilian and Hungarian authorities, as the couple were of Hungarian nationality in addition to being Swiss citizens and living in Switzerland. However, the Swiss authorities did not authorise the adoption due to age limits in place – the couple were 55 and 44 years older

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<sup>29</sup> *Schwizgebel v. Switzerland*, para 43.

<sup>30</sup> *Di Lazzaro v. Italy*, no. 31924/96, Commission decision of 10 July 1997.

<sup>31</sup> *Lang-Lüssi v. Switzerland*, no. 22206/93, Commission decision of 06 September 1995.

than X, the adopted child. A variety of reasons were given against authorising the adoption, such as the motives given by the couple for the adoption (they had had a child of their own who died in an accident), anticipated problems in puberty for X, possibly due to the age difference, and X being an only child, overly protected and spoiled in their care. Furthermore, bringing X to the country without proper authorisation acted against them. X was placed in a different family by the Swiss authorities. The Swiss authorities were not bound by the adoption decisions made by Brazilian or Hungarian authorities. An expert opinion commissioned by the Swiss authorities constituted that judging by the facts of the case, it was not in the best interest of X to be placed in the care of the couple. In front of the European Commission of Human Rights, the couple had evoked Article 8 of the Convention, but their application was deemed inadmissible.

The decision of *Pitzalis and Lo Sordo against Italy* from 1992<sup>32</sup> was related to *Lang-Lüssi*, but concerned solely the existence of an age limit of 40 years between adoptive parents and adoptees. Apart from the length of the proceedings, it was deemed inadmissible. The decision of *X. v. the Netherlands* from 1981<sup>33</sup> also concerned an age limit of 40 years, but also that the potential adoptive child should not be above schooling age. The substantive question in the case was that more stringent criteria were set for adopting a foreign child (Polish, in this case) compared to adopting a Dutch child. *X. v. Belgium and Netherlands* from 1975<sup>34</sup> concerned not just a difference in age between the applicant and the child he sought to adopt that he had already taken care of for several years, but also their different nationalities as well as X.'s status as an unmarried individual. X was of Dutch nationality but living in Belgium. Regarding the fact that it concerns an unmarried person, it resonates with *Marckx v. Belgium* and the need for an unmarried mother to adopt her biological child in order to be recognised as a parent. Couplehood was seen as essential:

*However, even assuming that the right to found a family may be considered irrespective of marriage, the problem is not solved. Article 12 recognises in fact the right of man and woman at the age of consent to found a family i.e. to have children. The existence of a couple is fundamental.*

*X. v. Belgium and the Netherlands, p.77*

Thus, the possibility to form family relations by adoption is confined, in the most part, to individuals whose status fits to the grid of genders and generations: marriage between a man and a woman, a limited difference in age that pays resemblance to having had the children by natural means, and to a

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<sup>32</sup> *Pitzalis and Lo Surdo v. Italy*, no. 15296/89, Commission decision of 13 May 1992.

<sup>33</sup> *X. v. the Netherlands*, no. 8896/80, Commission decision of 10 March 1981.

<sup>34</sup> *X. v. Belgium and the Netherlands*, no. 6482/74, Commission decision of 10 July 1975.

certain extent, the same nationality. On the other hand, as seen also in *Giubergia and others against Italy* from 1990<sup>35</sup> the risk of child trafficking is always existent in cross-border fostering and adoption, and thus stringent policy in authorising international adoptions is needed. Complaints concerning adoption tend to, for the most part, keep adoption as a restricted category in forming family relations. However, in the great majority of cases, once the criteria set for prospective adoptive parents are met, adoptive relations enjoy a high degree of legal protection, as noted in Chapter 5.1 concerning maternity and anonymous birth in conjunction with the cases of *Kearns v. France* from 2008<sup>36</sup> and *X v. the United Kingdom* from 1977<sup>37</sup>. However, adoptive relations may, in exceptional circumstances, be undone, as some judgements and decisions demonstrate<sup>38</sup>.

## 6.2 SECOND-PARENT ADOPTION

The Grand Chamber judgement of *X. and others v. Austria* from 2013<sup>39</sup>, the key case in this sub-chapter, concerns a female couple where one of the women was the biological, legal and social mother and the sole guardian of her child, and she and her female partner sought the possibility of second-parent adoption from the Austrian authorities. The child had been born outside marriage and had been living with his mother and her partner since the age of five years. The child had a father and a legally valid relationship with him, and the father and child enjoyed regular contact. There were two large questions in this case: the first one was that Austrian legislation offered the possibility of second-parent adoption to married opposite-sex couples without severing the tie with the other biological parent, but this was impossible for same-sex couples. If a same-sex couple sought second-parent adoption, this could lead to the closest parent, in this case the biological mother and the sole guardian, losing her status as a mother, which clearly would have been against the child's interests.

The other question complicating the case at hand was that the child had two parents, a mother and a father, and the father's consent was needed for an adoption to take place. In *X. and others*, the father was against the proposed adoption, and the mother and her partner argued that the court should override his view as, according to them, he had "displayed the utmost

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<sup>35</sup> *Giubergia*; *Giubergia-Gaveglia*; *Giubergia*; *Cruz v. Italy*, no. 15131/89, Commission decision of 5 March 1990, discussed in Chapter 6.2.

<sup>36</sup> *Kearns v. France*, no. 35991/04, 10 January 2008.

<sup>37</sup> *X v. the United Kingdom*, no. 7626/76, Commission decision of 11 July 1977.

<sup>38</sup> See *Ageyevy v. Russia*, no. 7075/10, 9 September 2013, *Kurochkin v. Ukraine*, no. 42276/08, 20 May 2010 and *X v. France*, no. 9993/82, Commission decision of 5 October 1982.

<sup>39</sup> *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013.

antagonism”<sup>40</sup> towards their *de facto* family unit. While exhausting their legal remedies in the Austrian courts, the couple had argued that “the refusal by the... father to consent to the adoption was not justified as he had been acting against the interests of the child”<sup>41</sup> and that the mother’s partner’s interest in the adoption “outweighed [the] father’s interest in objecting to it”<sup>42</sup>. The issue of possible discrimination arose from the fact that if the unmarried female couple in question had been composed of a woman and a man, “the District Court would have carried out a detailed examination and would have had to deliver a separate decision”<sup>43</sup> on whether the adoption sought would have been in the child’s interests. The Grand Chamber of the European Court of Human Rights ruled in the case of *X and others* that discrimination had taken place under Article 14 taken in conjunction with Article 8 compared to unmarried opposite-sex couples, but not compared to married couples. The crux of the matter was that their case could not be examined due to legal impossibility of investigating it further compared to unmarried opposite-sex couples.

The judgement of *Gas and Dubois v. France* from 2012<sup>44</sup> concerned a female couple from France who had had a child with the help of anonymous donor insemination in Belgium, as assisted reproduction services have for a long time been legally unavailable for lesbian couples in France. After giving birth in 2000, the birth mother was the only legal parent of the child. The couple in question concluded a *Pacs* in 2002, but this form of civil unions does not entail a legal relationship to one’s partner’s child.<sup>45</sup> The couple wanted to make the birth mother’s partner into an adoptive parent to the child by simple adoption (*adoption simple*), a lighter form of adoption than full adoption (*adoption plénière*) where all ties are terminated irrevocably and the child is issued with a new birth certificate. However, in simple adoption, parental rights were transferred completely to the adoptive parent if the child was underage. The only exception to this was in the case of married couples, where they could jointly become the child’s parents. In theory, the birth mother could have passed parental rights to the social mother, who could have then delegated parental rights partly back to her, so both of them would have been parents to a certain extent.<sup>46</sup> The problem was pretty much the same as in *X and others v. Austria*: it was not possible to have two female parents, so the birth mother would have lost her rights if they were passed to the other one. Their application was refused, and the authorities argued that it was not in the child’s interest to have the birth mother’s status altered even temporarily<sup>47</sup>.

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<sup>40</sup> *X and Others v. Austria*, para 14.

<sup>41</sup> *X and Others v. Austria*, para 65.

<sup>42</sup> *X and Others v. Austria*, para 65.

<sup>43</sup> *X and Others v. Austria*, para 65.

<sup>44</sup> *Gas and Dubois v. France*, no. 25951/07, ECHR 2012.

<sup>45</sup> *Gas and Dubois v. France*, paras 9-10.

<sup>46</sup> *Gas and Dubois v. France*, paras 11-16.

<sup>47</sup> *Gas and Dubois v. France*, para 15.

The European Court found no violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life). Thus, it saw that *Gas and Dubois* had not been discriminated against compared to a married opposite-sex couple, who would have been eligible to seek second-parent adoption in such a case.<sup>48</sup>

*Emonet and others v. Switzerland* from 2008<sup>49</sup> involved an adult woman, her mother and the mother's cohabiting male partner. The adult woman's father was deceased. All three had been living together for about six years before the woman married and left her family home to live with her husband. However, the marriage broke down, and due to an illness and an ensuing disability, she was dependent on the care given by her mother and her mother's partner. They decided that they wanted the mother's partner to adopt her so that they could become a family also in the legal sense of the term.<sup>50</sup> In 2000, the mother's partner, Mr Emonet, applied for an adoption with the Canton of Geneva Court of Justice with documents proving the approval of the woman to be adopted (Ms E) and her mother (Ms F). According to the case material, the Court of Justice pronounced the adoption without hearing or consulting the applicants about the effects of the adoption the following year.<sup>51</sup> After the adoption had been pronounced by the Court of Justice, cantonal civil status authorities informed the applicants that the pronounced adoption meant that the legal relationship between the mother and the daughter had been severed, that the mother's partner was now her only parent and she would have Mr Emonet's surname. The mother and daughter objected to this and asked their legal relationship to be restored.<sup>52</sup> The reason for severing the relationship was that Ms F and Mr Emonet were not spouses as they were cohabiting, and the law in place dictated that second-parent adoption was possible only when the couple in question were married.<sup>53</sup>

After exhausting the legal remedies and possibilities of appeal available to them in Switzerland, they complained to the European Court, arguing that their right to respect for family life under Article 8 had been violated. The Swiss Government argued that especially as the applicants were represented by a legal counsel, they should have been aware of the legal consequences of their situation, and that ignorance of the law was not a problem the State could be held accountable for.<sup>54</sup> The European Court noted that they did share *de facto* family life:

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<sup>48</sup> *Gas and Dubois v. France*, paras 68 and 73.

<sup>49</sup> *Emonet and Others v. Switzerland*, no. 39051/03, 13 December 2007.

<sup>50</sup> *Emonet and Others v. Switzerland*, paras 9-11.

<sup>51</sup> *Emonet and Others v. Switzerland*, see paras 13 and 51.

<sup>52</sup> *Emonet and Others v. Switzerland*, para 14.

<sup>53</sup> *Emonet and Others v. Switzerland*, para 15.

<sup>54</sup> *Emonet and Others v. Switzerland*, para 30.

*In the present case one of the partners in the couple is the biological mother of the adopted person, who was about 30 years old when she was adopted. The three applicants all lived together from 1986 to 1992, then the first applicant left the family home to live with her husband, whom she divorced in 1998. Since 2000 she has needed care and support, which the other two applicants provide. The Court therefore considers that what amounts to a de facto family tie exists between the three applicants[.]*

Emonet and Others v. Switzerland, para 37

The European Court stressed that regardless of whether they were represented by a legal professional or not, everyone is expected to know the law. Nevertheless, it found that they could not be blamed for not knowing what kind of “far-reaching consequences” the request for adoption would entail and found a violation of Article 8<sup>55</sup>. In conclusion, it noted in the spirit of *Kroon and others v. the Netherlands* that respecting

*...the applicants’ family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody.*

Emonet and Others v. Switzerland, para 86

*Emonet* provides a further example of the differences between adoption within marriage and outside it, as the marital relationship has indeed been seen in many jurisdictions as opening the possibility to rearrange family ties to conform to the ideal of the two-parent family of an opposite-sex couple. Outside marriage, regardless of enduring cohabitation between a couple, a request for adoption is seen as providing protection and security to a child legally abandoned by her original parent(s). It is open to debate whether the marital requirement is essential, but as debates on same-sex marriage show, the creation of a legally valid couple relationship is not just something an authority such as the State sees fit to require in certain contexts such as adoption, but also a privileged status that many couples wish to acquire.

A darker angle to intra-familial adoption may be deduced from two inadmissibility decisions concerning Italy in 1990, *N.Q., M.S. and S.S. v. Italy*<sup>56</sup> and *Giubergia and others v. Italy*<sup>57</sup>. Both of these cases concerned a Philippinean woman giving birth to a child who was then recognised by a

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<sup>55</sup> *Emonet and Others v. Switzerland*, para 85.

<sup>56</sup> *N.Q., M.S. and S.S. v. Italy*, 12612/86, Commission decision of 9 March 1990

<sup>57</sup> *Giubergia; Giubergia-Gaveglia; Giubergia; Cruz v. Italy*, no. 15131/89, Commission decision of 5 March 1990.

married Italian man to be his child born out of wedlock. In the first complaint, the child was born to a Philippinean maid working in Rome who did not officially recognise the child at birth due to the availability of anonymous birth in Italy. The child was recognised by a married man who claimed to have had an affair with the mother and that he was the child's biological father. A Child Court suspected the applicants, due to their contradicting testimonies, of having made a pact that the mother would hand the child over to the married couple concerned as they were childless and that the alleged father of the child had recognised the child in order to avoid a formal adoption procedure. The child was taken away from the applicants and placed into state care.<sup>58</sup>

In the complaint made by *Giubergia and others v. Italy*<sup>59</sup> a married couple had already legally adopted one child from the Philippines. During a journey to the Philippines, the husband recognised a child to be his own and brought her to Italy. In Italy, he tried to incorporate the child into his family as a child born out of wedlock he claimed he had fathered during an earlier trip to the Philippines. The tribunal in question dismissed this request and ordered for the child to be taken into state care. This case was a highly mediated event, where the applicants, a married couple, made appeals to various high-profile figures in Italy and gathered wide public support (see Scobie 1989 and Haberman 1990). In order to curb trafficking in children, the tribunal did not waive. The Commission (ECHR), too, deemed the complaint inadmissible. However, judging by the facts presented, *Giubergia* if not both cases might have concerned a private surrogacy arrangement and definitely act as a prelude to later surrogacy-related judgements from 2014, *Menesson v. France* and *Labassee v. France* (see Chapter 6.4).

### 6.3 ASSISTED REPRODUCTION AND LGBT PERSONS

Dividing the cases discussed in this study into neat categories of analysis is not always straightforward. The case of *Gas and Dubois v. France* could very well be categorised under assisted reproduction for same-sex couples, but the temporal contexts do matter: in the 2000s and 2010s, it is not a news item that female couples have babies with the help of donor insemination, and the legal question in the case was more about second-parent adoption, and merited to be discussed together with *X. and others v. Austria*, a very similar case. However, complaints similar to *Gas and Dubois* have appeared in the ECHR already in the 1980s and 1990s, concerning both transgender persons and lesbian women. In the Grand Chamber judgement of *X. Y. and Z. v. the United Kingdom* from 1997<sup>60</sup>, a key case in many ways, a transgender person, X, and his partner, Y, sought recognition of parental status for their child, Z, who had

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<sup>58</sup> *N.Q., M.S. and S.S. v. Italy*.

<sup>59</sup> *Giubergia; Giubergia-Gaveglia; Giubergia; Cruz v. Italy*.

<sup>60</sup> *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II.



been conceived with donated sperm from a third party and clinically assisted insemination. There are also other cases discussed in this sub-chapter that resulted in inadmissibility decisions in earlier years.

In *X. Y. and Z. v. the United Kingdom* from 1997, X, a post-operative male-to-female transgender person, and Y, his female partner, were asked to apply for parental recognition of X as the father of the possible child to be born from medically assisted insemination by the ethics committee of the hospital that granted them permission for the treatment. When X and Y first applied for assisted reproduction services with donor sperm, the ethics committee refused to grant them this treatment. X and Y appealed, providing the ethics committee with research findings according to which, for example, “in a study of thirty-seven children raised by transsexual or homosexual parents or carers, there was no evidence of abnormal sexual orientation or any other adverse effect”<sup>61</sup>. After the appeal, the ethics committee gave its consent to provide X and Y with the requested treatment.

The committee “asked X to acknowledge himself to be the father of the child within the meaning of the English 1990 Human Fertility and Embryology Act”<sup>62</sup>. Under this piece of legislation, the male partner of an unmarried woman giving birth by AID would be legally designated as the father of the child, not the sperm donor. First, X enquired from the Registrar General<sup>63</sup> whether he could be registered as the father of Z. He got a reply stating that “only a biological man could be regarded as a father for the purposes of registration”<sup>64</sup>. X and Y tried to register X as the father on Z’s birth certificate, but they were not permitted to do so, and this part of the certificate was left blank. At the time, English law did not recognise that a person’s sex could be changed by medical treatment. Despite X having undergone gender reassignment surgery, living as a man and acting as Z’s father, the English courts treated the cohabitation of X and Y as a relationship between two women. X and Y were encouraged to get a ‘joint residence order’, obtainable through the courts, which would have given X parental responsibility over Z until she reached majority.

The European Commission on Human Rights declared the complaints made by X and Y under Articles 8 and 14 admissible and dismissed the complaints under Articles 12 and 13 that had also been filed. The Commission was of the opinion that there had been a violation of Article 8 and that it was not necessary to consider whether there had been a violation of Article 14. In their submissions to the European Court, X and Y argued that they shared

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<sup>61</sup> *X, Y and Z v. the United Kingdom*, para 15. The reference given in the case material is Green 1978.

<sup>62</sup> *X, Y and Z v. the United Kingdom*, para 15.

<sup>63</sup> Synonymous with the General Register Office of England and Wales, the government authority responsible for the registration of births, deaths and marriages, but since 2005, also of same-sex civil partnerships and gender recognition for transgender persons.

<sup>64</sup> *X, Y and Z v. the United Kingdom*, para 17.

‘family life’ since the birth of their first child, Z. They drew attention to the doctrine of evolutive interpretation of the European Convention in the jurisprudence of the Commission and the Court, where “social reality, rather than formal legal status, was decisive”<sup>65</sup>. They also argued that due to X’s gender reassignment process and the social role he had assumed in the family, “to all appearances, the applicants lived as a traditional family”<sup>66</sup>. In turn, the British Government maintained that as X’s biological sex could not be completely modified to that of a male, X and Y were to be treated as two cohabiting women and that a family could not be established by two persons of the same sex who were unrelated. Furthermore, the Government argued that X could not be seen to share family life with Z, as they were not related to each other by “blood, marriage or adoption”<sup>67</sup>. According to English legal discourse these are the cornerstones of legally valid kinship ties.

Interestingly enough, the Commission was of the opinion that “aside from the fact that X was registered at birth as a woman and was therefore under a legal incapacity to marry Y or be registered as Z’s father, the applicants’ situation was indistinguishable from the traditional notion of ‘family life’”<sup>68</sup>. Thus it is likeness to the ‘traditional’ family model that gave this case a better footing according to the Commission, which had dismissed previous cases of families formed by lesbian couples as inadmissible. The European Court expressed that ‘family life’ under Article 8 was not limited to families formed by married couples. Other *de facto* relationships could be included in the notion of family life, as in the cases of *Marckx v. Belgium* (1979), *Keegan v. Ireland* (1994) and *Kroon and others v. the Netherlands* (1994). As to the essence of family life, the Court makes the following statement, which has since been widely cited in the case law of the ECHR and relevant literature:

*When deciding whether a relationship can be said to amount to ‘family life’, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.*

*X, Y and Z v. the United Kingdom, para 36*

The Court came to the conclusion that *de facto* family ties linked X, Y and Z and that Article 8 applied. X and Y elaborated some of the consequences following from the absence of a legal family tie between X and Z. For example, Z was not allowed to inherit X without the existence of a will or succeed to some tenancies in the event of X’s death.

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<sup>65</sup> *X, Y and Z v. the United Kingdom*, para 33.

<sup>66</sup> *X, Y and Z v. the United Kingdom*, para 33.

<sup>67</sup> *X, Y and Z v. the United Kingdom*, para 33.

<sup>68</sup> *X, Y and Z v. the United Kingdom*, para 35.

The Government representative maintained that X, Y and Z were free to live together as a family and that the concerns expressed above were “highly theoretical”<sup>69</sup>. A joint residence order would give X certain parental rights and duties. Interestingly, the Court observed that “the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront”<sup>70</sup> and it was “not clear that [an amendment to the law] would necessarily be to the advantage of [children such as Z]”<sup>71</sup>. The Court absolved itself from any greater responsibility towards the ‘best interest’ of Z by saying that “there is uncertainty with regard to how the interests of children in Z’s position can best be protected”<sup>72</sup> as well as by concluding that:

*Given that transsexuality [sic] raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 (art. 8) cannot, in this context, be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father. That being so, the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision (art. 8). It follows that there has been no violation of Article 8 of the Convention (art. 8).*

X, Y and Z v. the United Kingdom, para 52

The Court did not elaborate what these ‘complex issues’ in question are, but backed up the decision with a lack of European consensus on the matter. It found that article 8 was applicable but that there was no violation of it (14 votes to 6) and that there was no need to consider the case under article 14 (17 votes to 3). The legal situation of transgender persons differs substantially from that of homosexuals and bisexuals in many ways. What this particular case highlights is that unlike in parenting by same-sex couples, transgender parenting often conforms to prevalent gender roles and the model of the heterosexual family, and as can be seen from the above description, X and Y were arguing their case very much on their similarity to a ‘traditional family’.

In his concurring opinion, judge de Meyer touched upon the same issue of similitude: “There is certainly family life between Y and Z. However, between X and the two other applicants there is only the ‘appearances’ of ‘family ties’”<sup>73</sup>. Furthermore, de Meyer states that “it is self-evident that a person who is

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<sup>69</sup> X, Y and Z v. the United Kingdom, para 46.

<sup>70</sup> X, Y and Z v. the United Kingdom, para 46.

<sup>71</sup> X, Y and Z v. the United Kingdom, para 46.

<sup>72</sup> X, Y and Z v. the United Kingdom, para 51.

<sup>73</sup> Concurring opinion of judge de Meyer, X, Y and Z v. the United Kingdom.

manifestly not the father of a child has no right to be recognised as her father”<sup>74</sup>. What makes a kinship relation ‘manifest’? Adherence to the ‘symbolic order’ and the presence of two different sexes? In his concurring opinion, Judge Pettiti notes that “family, in general, cannot be a mere aggregate of the individuals living under one roof” and that “the ethical and social dimension of a family cannot be ignored or underestimated”<sup>75</sup>. He also questioned the ability of transgendered persons to raise children: “Studies have shown that not all transsexuals have the same aptitude for family life... as a non-transsexual”<sup>76</sup>, referring to research done under the auspices of the International Freudian Association<sup>77</sup>. Moreover, he points out:

*The growing number of precarious and unstable family situations is creating new difficulties for children of first and second families, whether legitimate, natural, successive or superimposed, and will in the future call for thoughtful consideration of the identity of the family and the meaning of the family life which Article 8... is intended to protect, taking into account the fact that priority must be given to the interests of the child and its future.*

*Concurring opinion of judge Pettiti, X, Y and Z v. the United Kingdom*

Thus, Judge Pettiti did not refer just to family formation by transgender persons, but to a more general concern over the acceptability of various forms of family life in Member States and the challenges they posed to a rather uniform and frozen view of family life, a nuclear family based on a relationship of heterosexual couple of cisgender (the opposite of ‘transgender’) persons. However, nothing in the case material had given an indication that the relationship of X and Y was in any way “precarious and unstable”<sup>78</sup>. Rather, the uncertainties of their family life are created rather by the lack of recognition by UK authorities and outsiders. In his dissenting opinion, Judge Vilhjálmsson submits that “under United Kingdom law it is now possible for the register to contain statements that are not in conformity with biological facts but are based on legal considerations”<sup>79</sup> referring to the abovementioned

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<sup>74</sup> Concurring opinion of judge de Meyer, *X, Y and Z v. the United Kingdom*.

<sup>75</sup> Concurring opinion of judge Pettiti, *X, Y and Z v. the United Kingdom*.

<sup>76</sup> Concurring opinion of judge Pettiti, *X, Y and Z v. the United Kingdom*.

<sup>77</sup> In his concurring opinion, Louis-Edmond Pettiti gives only the following details of the sources he refers to: “voir étude collective d’Alby et autres - Association internationale freudienne - “Identité sexuelle et transsexuels” ( “see collective study by Alby and others, International Freudian Association, ‘Sexual identity and transsexuals’) and a “Que-sais je?” book (a series of short paperback introductions into various topics published in the French-speaking world) by L. Pettiti, called “Les transsexuels” as a source for his argumentation. For the *Que-sais je?* book, see Pettiti 1992. The study referred to as “Alby and others” might be Alby et al. 1996, see Sources.

<sup>78</sup> See previous quote.

<sup>79</sup> Dissenting opinion of judge Vilhjálmsson, *X, Y and Z v. the United Kingdom*.

1990 Act where the male partner (husband or cohabitee) of the woman impregnated by means of assisted reproduction is treated as the father of the child. This statement highlights the role given to legal fictions in creating legal parental ties.

In the decision of *C. and L. M. v. United Kingdom* from 1989<sup>80</sup> an Australian woman had filed a complaint with her child against being deported from Britain where the applicant had been residing since 1984. In 1986, she applied to remain in the country in permanent employment as well as for permanent residence due to her relationship to E., a British national resident in the United Kingdom. Her residence application was rejected as lesbian relationships were not recognised in the immigration rules at the time. After having her child by artificial insemination, C. was being supported by E. In her complaint, C. evoked Articles 8, 12 (right to marry and to found a family) and 14, when in most of these cases only Articles 8 and 14 have been evoked. The Commission found that the lesbian relationship in question involved private life under Article 8. However, the State's rights to impose immigration controls overrode this, as in other kinds of relationships, but the Commission admitted that C. and E. were treated differently compared to if they had been a different-sex couple.

In *Kerkhoven, Hinke and Hinke v. the Netherlands* from 1992<sup>81</sup> a Dutch lesbian couple sought joint parental authority for a child they had had together by artificial insemination. They requested that they be jointly vested with the parental authority of the child they were raising together. The claim was struck down by three different levels of the Dutch judicial system. Only the biological mother had legal family ties with her son under Dutch law as, at the time: "only a man, whether the biological father of the child or not, can recognise a child."<sup>82</sup> The applicants evoked article 14 in conjunction with article 8 of the Convention. They complained that they were subject to discrimination as they were not able to enjoy their rights under article 8 regarding parental authority on the same footing as heterosexuals, and that their child was being "discriminated against on the ground of his birth and status in comparison with legitimate children"<sup>83</sup>. The Commission admitted that the provisions in article 8 are there to protect 'illegitimate' as well as 'legitimate' families, referring to the *Marckx v. Belgium* judgement from 1979, and that "there may be positive obligations inherent in an effective 'respect' for family life"<sup>84</sup>. However, the Commission stated that it had previously decided in the *Simpson v. United Kingdom* that "a stable homosexual relationship between two women does not fall within the scope of the right to respect for family life

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<sup>80</sup> *C. and L. M. v. the United Kingdom*, no. 14753/89, Commission decision of 9 October 1989.

<sup>81</sup> *Kerkhoven, Hinke and Hinke v. the Netherlands*, no. 15666/89, Commission decision of 19 May 1992.

<sup>82</sup> *Kerkhoven, Hinke and Hinke v. the Netherlands*, "The Facts"

<sup>83</sup> *Kerkhoven, Hinke and Hinke v. the Netherlands*, "The Law".

<sup>84</sup> *Kerkhoven, Hinke and Hinke v. the Netherlands*, "The Law".

ensured by article 8”<sup>85</sup>. Nevertheless, the Commission did acknowledge that what is at hand is a family-like situation, as it notes that the applicants are free to “live together as a family”<sup>86</sup>. This kind of a ‘freedom to live together’ has been the argument put forth by Governments and ECHR bodies in many cases involving family situations which have not all been characterised by sexual minority or transgender issues: *B., R. and J. v. the Federal Republic of Germany*, *Kerkhoven, Hinke and Hinke v. the Netherlands*, *X, Y and Z v. the United Kingdom* and most lately, *Chavdarov v. Bulgaria*.

## 6.4 USE OF GAMETES, EMBRYOS AND WOMBS

Whether one may obtain access to assisted reproduction services depends completely on the legislation of the state one resides in, and as noted above in the case of *Gas and Dubois v. France*, “reproductive tourism” may take place depending on whether certain forms of assisted reproduction are not available. In many states, single women and women with female partners may obtain these services in the private sector at their own cost. State-subsidised assisted reproduction services tend to be available only for opposite-sex couples, and in some states, they need to be married. A completely different question is what forms of assisted reproduction are available. This is a dynamic field of study, as both technological innovations and politico-legal processes influence it. New forms of treatment may be studied and invented, but whether they are legally available or not is a different question. Surrogacy, in turn, acts as the extreme form of assisted reproduction, as it does not concern merely the use of donated eggs of sperm, but the use of the bodily functions of a third party to produce a living person. The use of surrogate mothers is rare in Western Europe due legal restrictions, and commercial services in this area may generally be obtained, for example in the United States and some Eastern European and Asian States.

The Grand Chamber judgement case of *S.H. and others v. Austria* from 2011<sup>87</sup> touched upon the use of donated eggs and sperm in assisted reproduction. The applicants were two couples, of which the first one was made up of a woman who suffered from blocked fallopian tubes, meaning that she could produce ova, but had to resort to *in vitro* fertilisation. Her husband was infertile, meaning that they would have needed to use donated sperm from an third party in their *in vitro* treatment process. However, this was forbidden by Austrian law, even though the use of donated sperm in *in vivo* fertilisation, meaning directly inseminating a fertile woman with sperm from a third party was allowed by the law. The second couple was a made up of a woman who suffered from agonadism, meaning that she did not produce ova. Thus, she

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<sup>85</sup> *Kerkhoven, Hinke and Hinke v. the Netherlands*, “The Law”.

<sup>86</sup> *Kerkhoven, Hinke and Hinke v. the Netherlands*, “The Law”.

<sup>87</sup> *S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011.

and her husband, who was fertile, needed to resort to *in vitro* fertilisation with a donated egg from a third party. This was not allowed in Austrian law, which allowed *in vitro* fertilisation only with eggs and sperm from the couple to be treated. Allowing insemination with donated sperm was an exception in the law, due to the simplicity and the fact that historically, this technique of assisted reproduction dated from an earlier time than *in vitro* fertilisation.<sup>88</sup>

In the European Court, this case was subject to two conflicting judgements: a Chamber judgement in 2010<sup>89</sup> which found a violation of Article 8 and citing the illogical nature of the law in question as the main reason for this. However the case was referred to the Grand Chamber, which gave a judgement in late 2011<sup>90</sup>, stating that there had been no violation of Article 8 or any other right enshrined in the Convention. The text of the case offers also a brief overview of the practices of the Member States of the Council of Europe on the matter. In most Member States, assisted reproduction services, both public and private, were governed by relevant legislation. In a minority of these states, egg donation, sperm donation or both were not allowed. At the time, sperm donation was prohibited in Italy, Lithuania and Turkey. Donating eggs was prohibited in these three countries as well as in Austria, Croatia, Germany, Norway and Switzerland. Unlike Austria, States that allow sperm donation do not usually distinguish for which kind of techniques of assisted reproduction donated sperm may be used.<sup>91</sup>

The most interesting arguments put forward by the Austrian government and the intervening third parties arguing in the same lines (the German Government, the Italian Government, and the Catholic NGOs *European Centre for Law and Justice* and *Aktion Leben*) concerned the prohibition of egg donation. For example, the Austrian government maintained that

*In the debate in [the Austrian] Parliament it had been pointed out that ovum [egg] donation depended on the availability of ova and might lead to problematic developments such as the exploitation and humiliation of women, in particular those from an economically disadvantaged background. There was also the risk that pressure might be put on women undergoing in vitro fertilisation to provide more ova than strictly necessary for their own treatment to enable them to pay for it.*

S.H. and Others v. Austria, para 66

Furthermore, the Government of the respondent State, Austria, argued that “*In vitro* fertilisation also raised the question of unusual relationships in which the social circumstances deviated from the biological ones, namely, the

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<sup>88</sup> S.H. and Others v. Austria [GC], paras 9-14.

<sup>89</sup> See S.H. and Others v. Austria, no. 57813/00, ECHR 2010.

<sup>90</sup> S.H. and Others v. Austria [GC], no. 57813/00, ECHR 2011.

<sup>91</sup> S.H. and Others v. Austria [GC] paras 35-40.

division of motherhood into a biological aspect and an aspect of “carrying the child” and perhaps also a social aspect”<sup>92</sup>. In turn, the intervening German government supplied an argument concerning “split motherhood”:

*This prohibition [of egg donation] was intended to protect the child's welfare by ensuring the unambiguous identity of the mother. Splitting motherhood into a genetic and a biological mother would result in two women having a part in the creation of a child and would run counter to the established principle of unambiguousness of motherhood which represented a fundamental and basic social consensus. Split motherhood was contrary to the child's welfare because the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity.*

S.H. and Others v. Austria, para 70

The most ‘structuralist’ argument came from the Italian government, which, in addition to the risks of exploitation of poor women, trafficking ova and premature births due to IVF treatment, put forth the view that “to call maternal filiation into question by splitting motherhood would lead to a weakening of the entire structure of society”<sup>93</sup>. Interestingly, Italy is also a country that allows anonymous birth to take place. This “splitting of motherhood” into biological motherhood and legal/social motherhood is not seen, at least in the same way, to “call maternal filiation into question” and to “lead to a weakening of the entire structure of society”. Surely, the *mater semper certa est principle*, or the one-pillar structure of (gestational) maternity as the first and foremost parental relation available to a child, is of great importance in European legal thinking concerning maternal filiation. However, in most States this has been interpreted to mean that gestational motherhood, carrying and giving birth to a child, overruns genetic maternity in a case where they would be in conflict. Just like a sperm donor does not have a right to evoke paternity when there has been a male partner giving his consent to assisted reproduction and who is named as the father, an egg donor does not have a right to evoke maternity when the woman giving birth obviously has ‘consented’ to the treatment. This situation is, of course, reversed in contracted and commissioned surrogacy arrangements, but as remunerated surrogacy is not available in most European countries, this is not a widespread concern on a legal level.

The Grand Chamber judgement of *Evans v. the United Kingdom* from 2007<sup>94</sup> is also significant, as it concerns the use of embryos after separation and divorce. Evans, the female party to the couple in question, had pre-

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<sup>92</sup> S.H. and Others v. Austria [GC], para 67.

<sup>93</sup> S.H. and Others v. Austria, para 73.

<sup>94</sup> *Evans v. the United Kingdom*, no. 6339/05, 7 March 2006.



cancerous tumours developing in her ovaries, which meant that eggs could be harvested for *in vitro* fertilisation but that her ovaries should be removed after the harvesting.<sup>95</sup> She and her male partner sought fertility treatment services and consented to the use of their eggs and sperm for the purposes of assisted reproduction to create embryos from their cells. Evans underwent an operation where her ovaries were removed and she was told to wait for two years before embryos could be implanted into her uterus. During this two-year period, her relationship with her partner broke down. He asked their fertility clinic to destroy the embryos, as both of them could withdraw their consent to the process of assisted reproduction before the embryos were implanted.<sup>96</sup>

Evans initiated legal proceedings in England in order to prevent the destruction of the embryos, evoking the Human Rights Act, the implementation of the European Convention into English law. She evoked Articles 8, 12, and 14 regarding herself and Articles 2 and 8 regarding the embryos.<sup>97</sup> In the first instance of the case in the Family Court, the judge decided in favour of J, Evans' former husband, on the basis that the consent given by J was to be treated together with the applicant and that it was a right granted by the Parliament that he could withdraw his consent in order not to father a child after separation. The judge also evoked the symmetry of the situation if the sexes of the parties were reversed. A man could be rendered infertile due to cancer treatment, but his female partner could not be obliged, after separation, to have the embryos implanted.<sup>98</sup> In the Court of Appeal, the judges were not fully in agreement of the comparison to be done in the question: whether Evans's situation should be compared to that of infertile women with partners or to that of a fertile woman. If compared to fertile women, Evans' husband had had the chance to withdraw his consent at a later stage than if a child had been conceived through coitus. However, they were in agreement that Evans' treatment did not constitute discrimination under Article 14 in conjunction with Article 8. The House of Lords did not grant appeal, so the national remedies available to Evans were exhausted.<sup>99</sup>

In the European Court, Evans evoked Article 2, the right to life regarding the embryos, as well as Article 8 regarding her right to protection of private and family life. Regarding Article 2, the Grand Chamber of the European Court found that "the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere"<sup>100</sup>. English law did not grant embryos independent rights or interests, as was made clear by judges in the Court of

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<sup>95</sup> *Evans v. the United Kingdom*, para 14.

<sup>96</sup> *Evans v. the United Kingdom*, paras 15-18.

<sup>97</sup> *Evans v. the United Kingdom*, para 19.

<sup>98</sup> *Evans v. the United Kingdom*, paras 22-23.

<sup>99</sup> *Evans v. the United Kingdom*, paras 24-28.

<sup>100</sup> *Evans v. the United Kingdom*, para 54.

Appeal in Evans' case. As to Article 8 regarding Evans, she submitted to the Court that

*The female's role in IVF treatment was much more extensive and emotionally involving than that of the male, who donated his sperm and had no further active physical part to play in the process. The female gamete provider, by contrast, donated eggs, from a finite limited number available to her, after a series of sometimes painful medical interventions designed to maximise the potential for harvesting eggs. In the case of a woman with the applicant's medical history, she would never again have the opportunity to attempt to create a child using her gametes. Her emotional and physical investment in the process far surpassed that of the man and justified the promotion of her Article 8 rights. Instead, the 1990 Act operated so that the applicant's rights and freedoms in respect of creating a baby were dependent on J's whim. He was able to embark on the project of creating embryos with the applicant, offering such assurances as were necessary to convince her to proceed, and then abandon the project when he pleased, taking no responsibility for his original decision to become involved, and under no obligation even to provide an explanation for his behaviour.*

Evans v. the United Kingdom, para 62

The justifications given by Evans in order to argue for the possibility of exceptions to the principles laid down in the Human Fertilisation and Embryology Act are interesting, as they do convey a need to examine the case in a gender-sensitive manner. As noted in other cases discussed in this study, it is very rare, if non-existent, that the situations of a woman and a man would be somehow symmetrical regarding procreation, even though legal conceptions of formal equality would like to see and treat the competing interests of a woman and a man regarding their reproductive capacities in such a manner. However, in the case of Evans, the scales dipped in favour of her ex-husband. As in a variety of cases regarding adoption, the Articles related to marriage, family formation or family life included in the Convention have not been seen to provide any kind of a 'right to a child' as such through the means of adoption of assisted reproduction, as both procedures are subject to a heavy apparatus of legal regulation.

The culmination of assisted reproduction is surrogacy, that is, a woman giving birth to a child conceived with the help of assisted reproduction techniques and the child is then taken care of by the couple or person acting as the commissioning parent(s). Surrogacy arrangements are outlawed either completely or in commercial terms in most European States. In 2014, two judgements were given by the ECHR concerning the legal recognition of children born to French couples in the United States, *Mennesson v. France*<sup>101</sup>

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<sup>101</sup> *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).

and *Labassee v. France*<sup>102</sup>, on which the judgements were given on the same day. In *Mennesson*, a French couple had gone to the United States to obtain surrogacy services. The children born were twins who were born to a surrogate mother in the State of California, with the help of a donated egg and sperm obtained from Mr Mennesson. In the European Court, the couple wished to specify “that, in accordance with Californian law, the “surrogate mother” was not remunerated but merely received expenses... she and her husband were both high earners and therefore had a much higher income than the applicants and that it had been an act of solidarity on her part”<sup>103</sup>. The surrogacy arrangement was thus conducted in a developed State where it was legally regulated and the interests of the commissioning couple were protected, so this case does not reflect such a great socio-economic disparity between the commissioning parents and the surrogate mother as in some other countries which are popular surrogacy destinations such as India<sup>104</sup>.

Already during the pregnancy a judgement was issued by the Supreme Court of California after an application by the Mennesson couple and the surrogate mother stating “that the first applicant would be the “genetic father” and the second applicant the “legal mother” of any child to whom the surrogate mother gave birth within the following four months. The judgement specified the particulars that were to be entered in the birth certificate and stated that the first and second applicants should be recorded as the father and mother.”<sup>105</sup> After the birth of twins in 2000, Mr Mennesson went to the local consulate of France to enter the births of the children to the register of births, deaths and marriages and to have their names entered to his passport. According to the applicants, many other commissioning parents had been able to obtain such a service. However, the consulate rejected this as it could not be proven that Ms Mennesson had given birth. The file was sent to the public prosecutors’ office in Nantes. The public prosecutor came to the conclusion that obtaining surrogacy services in a State where it was legal was not a punishable offence in France. The details of the birth certificates of the children were entered into the register of births, death and marriages.<sup>106</sup>

However, the Nantes public prosecutor began legal proceedings against the Mennessons to have these entries to the register annulled. The argument was that “an agreement whereby a woman undertook to conceive and bear a child and relinquish it at birth was null and void in accordance with the public-policy principle that the human body and civil status are inalienable”<sup>107</sup>. The

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<sup>102</sup> *Labassee v. France*, no. 65941/11, 26 June 2014.

<sup>103</sup> *Mennesson v. France*, para 8.

<sup>104</sup> See pending applications to the European Court of Human Rights, *Foulon v. France* (no. 9063/14) and *Bouvet v. France* (no. 10410/14) (European Court of Human Rights 2015b)

<sup>105</sup> *Mennesson v. France*, para 9.

<sup>106</sup> *Mennesson v. France*, paras 9-17.

<sup>107</sup> *Mennesson v. France*, para 18.

views of the French civil courts varied on the matter, but the final word was given by the Court of Cassation in 2011 when it noted that

*... the refusal to register the particulars of a birth certificate drawn up in execution of a foreign court decision, based on the incompatibility of that decision with French international public policy, is justified where that decision contains provisions which conflict with essential principles of French law. According to the current position under domestic law, it is contrary to the principle of inalienability of civil status – a fundamental principle of French law – to give effect, in terms of the legal parent-child relationship, to a surrogacy agreement, which, while it may be lawful in another country, is null and void on public-policy grounds...*

*Cited in Mennesson v. France, para 27*

Furthermore, the same Court noted that the outcome of the case “does not deprive the children of the legal parent-child relationship recognised under Californian law and does not prevent them from living with Mr and Mrs Mennesson in France”<sup>108</sup>. The Court of Cassation also reviewed the case in light of ECHR jurisprudence<sup>109</sup> and expressly stated that this outcome did not violate the right of the children under Article 8 of the European Convention or the paramount concern of their best interests under the Convention on the Rights of the Child.<sup>110</sup>

As the children had obtained citizenship and passports of the United States by virtue of being born on U.S. soil, they could leave the United States soon after their birth and go to France with the Mennessons. Various legal and practical problems were created by the lack of a legal parent-child relation: the children did not have French nationality, French passports or valid residence permits. As minors they could not be deported, but when attaining their majority they faced the possibility of expulsion. They had no particular rights vis-à-vis their parents such as inheritance rights. If the parents were to divorce, the mother had no legal standing towards the children to obtain access to them, and if the father were to die she was not regarded as a guardian. The parents and children and especially the mother and children were legal strangers to each other, which led to a “legally clandestine”<sup>111</sup> family life.<sup>112</sup> The children went to school and led a normal quotidian life with their parents, but as minors officially unrelated to anyone in the country. The applicants described the practicalities of dealing with public authorities as follows:

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<sup>108</sup> Cited in *Mennesson v. France*, para 27.

<sup>109</sup> Namely *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28 June 2007.

<sup>110</sup> *Mennesson v. France*, para 27.

<sup>111</sup> *Mennesson v. France*, para 26.

<sup>112</sup> *Mennesson v. France*, para 68.

*For administrative steps for which French nationality or an official legal parent-child relationship were required (registration of the children for social-security purposes, enrolment at the school canteen or outdoor centre, or applications for financial assistance from the Family Allowances Office), they had to produce the US birth certificates together with an officially sworn translation in order to prove that the children were theirs, and the success of their application depended on the good will of the person dealing with it.*

Mennesson v. France, para 68

The European Court, too, discussed the freedom of living together in a *de facto* family unit not infringing Article 8 rights in the strictest sense, an approach it had vindicated when not recognising the wishes of the applicants to have their family relations recognised in *Kerkhoven, Hinke and Hinke* (see sub-chapter 6.3) and *Chavdarov* (see sub-chapter 5.3):

*[The European Court] notes that the applicants do not claim that it has been impossible to overcome the difficulties they referred to and have not shown that the inability to obtain recognition of the legal parent-child relationship under French law has prevented them from enjoying in France their right to respect for their family life. In that connection it observes that they were all four able to settle in France shortly after the birth of the third and fourth applicants, are in a position to live there together in conditions broadly comparable to those of other families and that there is nothing to suggest that they are at risk of being separated by the authorities on account of their situation under French law...*

Mennesson v. France, para 68

The European Court found that the rights of the parents under Article 8 had not been violated, but it took up the issue of the rights of the children and scrutinised it with more care than the French courts had. It stressed the importance of the children in question to be able to construct their identity as “respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship”<sup>113</sup>. The Court noted that nationality and inheritance were among the practical issues affected by the lack of a legal relationship.

In light of the analysis of the constitution of paternity performed in this study in sub-chapters 5.3 and 5.4, it is notable that in the *Mennesson* case the genetic relationship between the intended father and the children was not given particular significance by the French authorities, as the practice of recognition by the father is a way of incorporating children born through surrogacy into the intended family unit. It could be stated that in this case, the

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<sup>113</sup> *Mennesson v. France*, para 96

genetic relation of paternity did not amount to a “biological” relation, if that would be understood as encompassing coital, genetic and co-gestational relations between a father and child. In turn, the European Court saw the right to know one’s genetic origins and paternity as a significant issue under the establishment of identity:

*Not only was the relationship between the third and fourth applicants and their biological father not recognised when registration of the details of the birth certificates was requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of de facto enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in its case-law in that regard... The Court considers, having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation.*

Mennesson v. France, para 100

Thus, the importance of knowing one’s origins and identity led to the Court finding that the lack of recognition of a legal parent-child relationship, in this case the genetic relationship between the commissioning father and the children born of the surrogacy arrangement, infringed the right to respect for private life of the Mennesson twins under Article 8 of the Convention. Unlike the French Courts, the European Court took the best interests of the children seriously, mandating that despite the surrogacy arrangement, which was null and void under French law, their rights as persons had to be taken into consideration.

The facts in the complaint of *Labassee v. France* were very similar, except that there was only one child, and the substantive content of the judgements is the same: the rights of the parents under Article 8 had not been violated, but the right to respect for private life of the child had been violated<sup>114</sup>. As this child had also been born through a surrogacy arrangement in the United States, she had obtained U.S. citizenship and was not stateless. However, perhaps it was just the fact that the children were not stateless that made it possible for the authorities to let them remain in a legal limbo. *Labassee* contains references to various studies on the subject of bioethics, surrogacy and filiation in France<sup>115</sup>. It also contains a comparative survey of the legality of surrogacy in the Member States of the Council of Europe.<sup>116</sup> One of the expert reports was a State-commissioned study by a working group led by Irène Théry (Théry and Leroyer 2014). In this report it is proposed that the family situations of

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<sup>114</sup> *Labassee v. France*, para 81.

<sup>115</sup> *Labassee v. France*, paras 28-30.

<sup>116</sup> *Labassee v. France*, paras 31-33.

children born abroad as a result of surrogacy arrangements should be recognised as it is in the child's interests to establish legal relations to the commissioning parents. However, Théry and Leroyer also state that France should engage firmly in the creation of an international legal instrument to combat the "enslavement" of women by surrogacy organisations (Théry and Leroyer 2014: 198).

## 6.5 DISCUSSION: WHAT ARE FAMILIES MADE OF?

*What is the contemporary voice that enters into the language of the law to disrupt its univocal workings? ... when there are two men or two women who parent, are we to assume that some primary division of gendered roles organizes their psychic places within the scene, so that the empirical contingency of two same-gendered parents is nevertheless straightened out by the presocial psychic place of the Mother and the Father into which they enter? Does it make sense on these occasions to insist that there are symbolic positions of Mother and Father that every psyche must accept regardless of the social form that kinship takes? Or is that a way of reinstating a heterosexual organization of parenting at the psychic level that can accommodate all manner of gender variation at the social level?*

Judith Butler (2000: 69)

Adoption and assisted reproduction are fields where the dynamics and rules of filiation are at their barest: as these situations are often stripped of the commonsensical logic of biological relations, and the significance of genetic and gestational ties are discussed in more detail. These kinds of cases also bring forth the rationales that dictate the constitution of parent-child relations in European legal cultures. In recent years, these areas have been much debated in the context of dyadic same-sex adult relations, be it adoption by same-sex couples or the availability of assisted reproduction services for different kinds of couples and individuals. However, as especially the cases of *S.H. and others v. Austria* and *Evans v. the United Kingdom* demonstrate, some of the weightiest and complex cases in the case law of the European Court in this area do not deal with the problematics of gender, sexuality and identity, but the engenderment of life itself.

In adoption, status is still of great importance, as persons willing to adopt are valued in a hierarchical fashion according to their marital status as well as health, wealth and personal capabilities. However, in the context of this study, status refers mainly to whether one is married to a person of the opposite sex or not, and by outcome, to one's sex within a binary system of parentage, adoptive mothers and fathers. Single people are caught in a trap of both status and identity: their unmarried status is a disadvantage as a potential adoptive parents, and their sexual identities may come under scrutiny as well, as in the cases of *E.B.* and *Fretté*. So far, there has not been a case in the ECHR system

which would have involved the impossibility to adopt jointly for a same-sex couple, but as same-sex marriage and/or joint adoption for same-sex couples (the two do not always go hand in hand) have become possible in many European states, cases like this will probably appear in the future. Due to the very high contextuality of adoption as it rests on a very personal evaluation of those applying for authorisation to adopt, it is hard to see how re-structuring the field of adoption from the perspective of human rights would function apart from eradicating the most blatant discrimination as in *Fretté v. France* and *E.B. v. France*. Even though the possibility of same-sex couples to adopt has been a fervently debated issue in many European polities in recent years, adoption itself remains a very specialised practice through which only certain people are able to construct family relations. The range of criteria that one needs to fulfil in order to become an adoptive parent is so wide that eradicating sexual orientation among them as irrelevant is more important on the level of principle rather than opening realistic possibilities of adoption to many people either as potential adoptive parents or to children being adopted.

It is open to dispute whether the sex of the three different biological/legal and social parental figures in *X and others v. Austria* is relevant from a relational point of view. The social parents at birth may be a woman and a man, as in *X and others*, or two women as in *Gas and Dubois v. France*. However, a biological father, if he is recognised as a legal father at birth or shortly after, occupies a certain position and status that is specific to his sex, just like a childbearing woman is in the primary position when it comes to attaching parents to a child at the time of birth. Legally, the crux of the matter in *X and others v. Austria* was that the State was not obliged to examine if the second-parent adoption proposed by the child's mother and her female partner would have been in the child's interests due to the sex of the proposed adoptive parent. From a relational point of view, it is evident that the child already had another birth parent, the father, and there was no evidence presented in the case material as such pointing towards him being an unfit parent. It was the mother and her partner who argued that it was in the child's interest to be adopted by the mother's partner, and the father opposed. In *Gas and Dubois*, the child had only one legal parent, and would have probably benefited from having the other birth parent recognised.

From a relational perspective *X and others* leaves us with the question of how easily a legally recognised parent may be changed: as the father had a biological, legal and social relation with the child, there would have to be very weighty reasons for undoing his legal relation to the child against his will. Thus, as to the contextual and relational set-up, the gender-specific set-up of parentage does leave a reader with a certain set of unease to the antagonism between separated birth parents and how far that may be allowed to affect the examination of the need to perform a second-parent adoption when a child already has two legal parents, male or female, who take an interest in the child's life. A biological father's standing vis-à-vis his child may be of a weaker and a more contingent kind compared to the birth mother, but if he exists as a



person in the child's life and not just as a mere sperm donor, he is 'second-in-line' in the imaginary line-up of possible parents, and the genetic relation adds an additional dimension to the relation. To recall the conclusions on the relinquishment of maternity and subsequent adoption in *Odièvre v. France*, *Kearns v. France*, *Godelli v. Italy* and *X. against the United Kingdom* in Chapter 4, in relation to adoption, what law has once joined, is difficult to pull apart. Thus, once again, parenthood is first and foremost built on the link between a birth mother and her child, Fineman's (1995) "core family" on the basis of which it may be built further, enlarged or altered.

Cases where transgender persons and same-sex couples have formed families through assisted reproduction or private arrangements coming close to assisted reproduction show that on the level of clinical practice or everyday life, these arrangements have, for quite some time in some Member States, been mundane events but lacking legal recognition in making them officially relevant family relations. This leads us to the question whether becoming a parent should be possible for couples or individuals who are incapable of giving birth to a child because of being male individuals, male couples or a female without a functioning womb. With a burgeoning global market for surrogacy services for both infertile opposite-sex couples, male couples and individuals wishing to obtain surrogacy services, this is a question that indeed begs for an answer, and the findings of the European Court in *Menesson* and *Labassee* will probably be addressed in the context of a male commissioning couple sooner or later.

Iacub (2004, 2009: 259-282) suggests that as men can become fathers without being genitors, this should be possible for women as well with the help of surrogacy arrangements. In her view, this would be a step towards more genuine gender equality, and it would open up parenthood for non-heterosexuals as well. However, Iacub (2004, 2009) does not address any problems related to surrogacy. When discussing surrogacy arrangements Iacub (2009) paints a picture of individuals who are willing, free and able to enter into contracts where the womb, or the 'empire of the belly', as she has it, is not a potential site of physical, economic or psychological exploitation. In Iacub's utopia, surrogate mothers are not affected by economic necessity, external constraint or lack of opportunities when turning their bodies into merchandise. The point under elaboration here is not that a woman's sexual or reproductive capacities would be 'sacred territory' in which economic exploitation is the ultimate taboo; the question is about the "inalienability of civil status" as conceived in *Menesson* and *Labassee*. Allowing remunerated surrogacy arrangements would create hierarchies and economic inequalities between women that would outweigh current 'inequalities' between fertile and infertile women. A child given up for adoption anywhere in the world has always been carried and given birth to by a woman whose rights need to be respected, as well as those of the child born.

What is most perplexing in the judgements of the European Court in these cases is that it found in both cases that the private life, or "identity rights" of

the children born of surrogacy arrangements had been violated, but not the family life of any of the parties. Obviously, the parents had contravened French law and public policy by seeking surrogacy services abroad, and the reluctance of both the French courts and the European Court to discuss their rights under Article 8 was understandable. However, as the children were not taken into state care due to their legally precarious situation but were allowed to live with their parents, they had established family relations to their parents. So, do legally unrecognised children born of surrogacy arrangements have family life, or is that just for “legal families” and children? The ethical questions here are more complex than in complaints concerning children born out of wedlock, but one cannot escape the idea that the reluctance to recognise the legal existence of children born of surrogacy arrangements, regardless of the illegal steps taken by their parents is akin to punishing children for their parents’ deeds in the *Marckx* era. Furthermore, from the point of view of the dichotomy of status and identity, identity is seen here in a very fundamental form of civil identity: nationality and recognised kinship relations.

Regardless of the national political and economic contexts of the States where they are carried out, surrogacy arrangements bring considerable ethical and moral concerns into the spotlight. In many destinations of surrogacy tourism, it might officially not be subject to pure commercial and contractual responsibility, but ‘compensating expenses’ for the woman acting as a surrogate might just be less controlled. Somewhat in a similar manner than prostitution, making concessions to a woman’s bodily integrity in exchange for money might not be her personal choice as she might be pressured into it by other persons benefiting from the arrangement financially. Even if we assume that the choice to become a surrogate mother is the woman’s alone, taking advantage of this is problematic from the point of view of the principle of the “inalienability of human rights and civil status” argued by the French government in *Mennesson* and *Labassee*. Socio-economic difference between the intended parents and the surrogate just exacerbate the relational setting in addition to the core question of whether benefiting from someone else’s gestational capacity can be sustained, even if the subject herself is willing.

In these two cases concerning surrogacy, the French Government was defending its relatively sustained legal reluctance to recognise surrogacy, widely shared by other (Western) European States, if not always so pronounced as in French law. However, forbidding surrogacy in a certain State does not eradicate the problem that if actual persons, minors, have been born, their rights as persons need to be recognised. Leaving the children in these cases in legal limbo sanctioned by Courts and Governments seems highly suspect as well. As suggested in the expert report cited in *Labassee v. France* (Théry and Leroyer 2014), the least that can be done is to grant parental status on the basis of biological paternity and thus open the possibilities of second-parent adoption. This brings us to a fundamental question: even though the practise through which these children have been born does not stand up to ethical scrutiny from a perspective of the inalienability of the human body, the

children born should not be made to suffer the consequences of the actions of their parents. To be consistent, if surrogacy as a practise is not tolerated and States wish to take their duties to promote human rights seriously, States need to take a special interest in the legal status of children born from (international) surrogacy arrangements, perhaps by designating them with actual State-appointed guardians in the form of officials, and/or to regularise the relationship these children have with their day-to-day parents. It goes to note that in these surrogacy cases, there was no question of removing the children from the care of their parents, even though this happens too, but in cases where the parents have been deemed unfit by other criteria than just resorting to surrogacy arrangements<sup>117</sup>.

Drawing a line noting what is acceptable or not, especially under the umbrella of a politically and ethically charged notion of 'human rights', is a tricky task and calls for contextuality and flexibility in taking into account the interests of third parties: in the cases of *Mennesson* and *Labassee*, this refers to the children who did not ask to be born to a situation where they are left to a legal limbo for years if not a lifetime, a situation created both by their parents in resorting to transnational surrogacy and the relevant authorities and courts in interpreting the law in a way that left the most vulnerable parties, the children, without full legal protection. From the point of view of this study, surrogacy is a form of reproduction that enmeshes consanguinity and filiation in ways that produce a thoroughly conflicting situation and the most poignant examples of conflicting interests in the area of reproduction. Furthermore, it illustrates why the notion of the 'empire of the belly' sketched by Iacub (2004) needs to be taken seriously: to Iacub, it means the supremacy of women in the area of physical reproduction framed by a simplistic notion of gender equality that only engages with the idea of symmetrical rights, not an act of judgement taking into account the principles applied to the process.

In conclusion to analysing the case law probing the limits of the inalienability of the human body and especially the bodily capacities of women of reproductive ability, I suggest rewriting the Iacub's notion of the 'empire of the belly' (2004) with the help of Nedelsky's framework of restructuring relations through rights that concern reproduction to protect core values such as the physical integrity of women, risk-assessment relating to processes of gestation and an ethic of not just care, but elementary recognition of legal identity for the persons born from surrogacy arrangements. It is no easy task to accommodate the results of processes where the law and public policy of a particular State has been contravened such as when seeking surrogacy services abroad, but the need for a legal identity and ensuing relations to one's carers and to one's State for the persons born of these arrangements should be safeguarded. Making sure children are not left stateless and regularising their possibility to stay in their home countries should be the top priority. In many

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<sup>117</sup> See Frati et al. (2015) and the judgment of *Paradiso and Campanelli v. Italy*, 27 January 2015 (not in data).

cases the children are well taken care of and may live with their intended parents, but sometimes children born through illicit surrogacy arrangements are taken into State care when need may be. Regardless of the particular circumstances surrounding each case, the States in question should take a special interest in safeguarding both the generally applicable rights and the specific circumstances of children born through surrogacy services obtained abroad, instead of letting them grow up in a legal limbo.

## CONCLUSION: RELATIONAL SUBJECTS OF A NEW ERA

*Feminists have campaigned for, and won, legal reforms that are couched in what are now usually called 'gender neutral' terms. Such reforms can mean that that women's civil rights are safeguarded, but this approach to reform can also lead to curious results when, for example, attempts are made to incorporate pregnancy into legislation that applies indifferently to men or women. Odd things happen to women when the assumption is made that the only alternative to the patriarchal construction of sexual difference is the ostensibly sex-neutral 'individual'.*

*Carole Pateman (1988: 187)*

The aim of this study has been to examine, from a sociological perspective, how family relations as a core object of sociological and anthropological analysis are seen, defined and recognised in a field of intergovernmental human rights jurisprudence, the legal interpretation of the European Convention on Human Rights. The motivation behind this endeavour has been that opening this area of study up to extra-legal analysis with the help of notions and methods of social and political sciences is beneficial from many perspectives. It is valuable for social scientists and other non-lawyers in order to gain insight into what kind of development takes place in an area of legal interpretation such as European human rights jurisprudence and for lawyers to see how the texts they create, study and interpret may be viewed, understood and sometimes misunderstood from the perspectives of other disciplines. The workings of law on the domestic level (within States) and on the international level (between States) are often seen by non-lawyers as technical, complicated and difficult to understand. Acquired expertise within a profession such as litigation before international courts and addressing the claim at hand in the specialist language in question is a valuable specialisation. However, the essence of the conflicts between the applicants and the States in the judgements and decisions analysed in this study stem from the mundane world of the private and intimate sphere of everyday life: who one sleeps, eats and lives with, or does not.

Many years ago I attended a summer school in international law intended for Master's level students and doctoral candidates where the participants had arrived from different parts of the world. A wide variety of distinguished international scholars had been invited to act as lecturers. A lecturer who was indeed a lawyer but rather a scholar in legal and social theory with a special interest in anthropological theory wanted to explain an argument of his concerning the conflict between kinship and totalitarianism. For the purposes of this anecdote, it suffices to say that he was trying to explain to us that

kinship relations are an opposing force to totalitarian rule. As he started explaining the thought of Lévi-Strauss and how the “exchange of women” figured in creating alliances between kin groups, several critical remarks emerged from students who apparently heard of these theoretical notions for the first time. A few students, mainly women, dismissed this piece of thinking as blatantly patriarchal, thus useless. The lecturer desperately tried to explain that this was not a description or a prescription on how things were or should have been in the distant or less distant past. Nevertheless, the rapport between the lecturer and these outspoken representatives of the audience had turned sour, and whatever argument he had in mind that he tried to convey to us was left into oblivion.

I hope that this anecdote helps to illustrate why ‘translating’ knowledge from one discipline of social and political sciences (broadly understood, incorporating law and legal theory, too) to another is useful. Learning about the essential content of the shared canon of humanities and social sciences such as the thought of Lévi-Strauss is helpful so that we may understand what a scholar striving to produce interdisciplinary research is talking about, as in the classroom example above, but also so that we may be able to distinguish between different layers of scholarly work and theoretical thought. The ‘exchange of women’ is a notion derived from how relations of alliance, filiation and cooperation have been played out in indigenous societies, and Lévi-Strauss derived his theory on a wealth of ethnographic data on this subject (Lévi-Strauss 1949). Social contract theory is another example: 18th century philosophers did not think that an actual contract between the people at the dawn of society and the ones who ruled them was made, but how people act in society reflects a shared understanding of the division of power in society. And without the just as imaginary notion of a social contract, Pateman (1988) would not have been able to build her argument of a similarly imaginary “sexual contract” upon which the roles of men and women in society and reproduction in its physical and material manifestations and divisions of everyday labour is structured.

This conclusion is structured as follows: First I describe the main import of each chapter, be it of the theoretical, historical, methodological or empirical kind. Then I proceed to discussing what kind of a relational analysis has been carried out in this study, and whether the questions on restructuring relations with the help of rights provided by Nedelsky (2012: 235, see Chapter 3.3) have been useful. Then, I dissect the importance of different types of relations under each main thematic category, so biological, legal, social and gendered relations are examined under each thematic category of empirical analysis: alliance, consanguinity and filiation. The main points of discussion and also normative reflection that emerge are the role of gendered corporeality and its relation to human rights thinking. This follows from the continuing divergence between instituting alliance and filiation and an evaluation of the implications of this divergence to a gendered notion of family formation as a social practice. It is also examined what kind of relational and gendered legal subjects emerge

from the empirical analysis carried out in this study and whether they can be said to emerge as a result of a rather undeniable historical shift from status to identity in family law (see Leckey 2008: 248).

## I EMPIRICAL FINDINGS FROM CASE LAW

Chapter 1 starts off by introducing the thematic categories of *alliance*, *consanguinity* and *filiation* (Lévi-Strauss 1958: 56) under which I have analysed my data but which also act as notions stemming from the importance of illustrating different modes of kinship relations. Alliance refers to the act of forming a union, be it cohabitation, marriage or a civil union where two adults form a household and/or a family unit on the basis of their sexual relationship. An intimate couple relationship as a requirement for recognising a relation between two adults as family life is a definition that has been criticised, for example, by Fineman (1995) with her notion of a “sexual family” where the recognition of the family unit rests on a sexual relationship between the two adults, and this indeed pushes one to think whether this really constitutes a line that needs to be drawn to recognise a unit of diffuse, enduring solidarity (Schneider 1987). I argue that this requirement of a sexual relationship acts as a more coy, modern-day equivalent of the need for consummation to take place so that a marriage ‘exists’ and as a reflection of the need to control sexuality. This division between dyadic sexual relations adhering to the restrictions in place for marriage regarding age and degree of familial proximity is a similar line that emerges from the data in this study, too. However, broadening the scope of household units protected by legislation in place to privilege certain forms of family relations might not protect any particular relational good, such as in the case of *Burden v. the United Kingdom*<sup>1</sup>, where the wealthy sisters living together sought the same level of lower taxation as married couples or couples in a civil partnership. Rather, the legal privileges accorded to couples on the basis of marriage or civil unions should be scrutinised and policies reviewed.

The theoretical background for the analysis of the data in this study is presented by introducing debates on the ‘symbolic order’ of gender and kinship that took place in France from the 1990 to the 2010s in the wake of instituting civil unions (*Pacs*, passed in 1999) and same-sex marriage (passed in 2013). What this set of debate illustrates is how anthropological theory as well as psychoanalytical viewpoints were applied to the political dilemma of whether or not to open up marriage-like unions, marriage and forms of instituting filiation such as full adoption, second-parent adoption and assisted reproduction services to other than opposite-sex couples, meaning same-sex couples and single women (see Robcis 2013). This set of thought ties in with a juxtaposition sketched in this study between singularist proponents of

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<sup>1</sup> *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008.

marriage and filiation as essentially heterosexual institutions, and pluralist proponents of self-defined subjectivity in the field of family formation, navigating in the margins of family law depending on the State in question (see Stacey 2013).

The latter approach may be understood with the help of theoretical thought from the fields of feminist legal and political theory packaged as “relational theory” (Leckey 2008) inspired by multidisciplinary debates on the ethic of care (e.g. Gilligan 1982) with a focus on feminist approaches to legal subjectivity (Lacey 1995, 1996) and what to do with relational thought, human rights and normative dilemmas (Nedelsky 2011, 2012). What is called “relational theory” by Leckey (2008) is complemented with a discussion of some strands of relational sociology that helps in framing the questions asked in this study from the perspective of sociological theory. What emerges from debates on the essence of relational sociology is a distinction between two outlooks: what I call “transcendentalist”, represented by Donati and Archer (2015, see also Donati 2011) and “transactionalist”, in their own terms, represented by Emirbayer (1997), Crossley (2010; 2013) and Dépelteau (2008; 2013). This is based on divergent views between these schools on social ontology: may relations between humans and between humans and institutions be reduced to transactions or are relations thought to have emergent properties and thus to ‘exist’ in their own right? This study favors the latter approach, mainly because the “transcendentalist” model does not seem to be equipped to respond to the complexities and the ethical demands posed by the pluralist family model.

Chapter 2 presents a brief history on the concept of ‘family’ in international human rights law and especially in the founding document of international human rights law after the Second World War, the Universal Declaration of Human Rights from 1948. Through an exegesis and a historical analysis of the drafting of the definition of family in Article 16 of the Universal Declaration it is shown that the language and style adopted in the drafting process of several (but not all) Articles of the UDHR was influenced by Catholic social teaching, especially through the agency of Charles Malik, a Neo-Thomist philosopher (Morsink 1999). A comparison to an almost identical definition of family in the Constitution of the Republic of Ireland from 1937 shows that the linguistic guise of the definition of family in the UDHR pays tribute to certain Encyclicals of the Catholic Church, *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931) (Kennedy 1998, see also Cere 2009). As such, this historical and textual similitude lends support to the proponents of a conservative interpretation of what family is meant to mean in the context of international human rights law.

However, subsequent human rights conventions of the United Nations and other relevant intergovernmental documents on a global scale and within the Council of Europe either reflect just certain parts of the legacy of the UDHR or have departed from the set of thought it conveys. Especially the European Convention on Human Rights is, according to doctrines developed by the European Court of Human Rights itself, in its case law interpreted dynamically



and contextually according to temporally shifting epistemic contexts and political and social conditions (see e.g. Johnson 2013). During the last ten years, there have indeed been many judgements in the European Court of Human Rights which have fundamentally reconsidered certain areas of application in the right to respect for private and family life, such as the possibility of single non-heterosexual persons to apply for an adoption licence<sup>2</sup>, the possibility of second-parent adoption among same-sex couples<sup>3</sup> and the duty of the State to offer relationship registration for same-sex couples as well if it is offered to opposite-sex couples<sup>4</sup> and finally, very recently, to offer same-sex couples some form of civil unions<sup>5</sup>.

In Chapter 3 the human rights principles evoked in the data of this study as enshrined in Article 8 (right to respect for private and family life) and Article 12 (right to marry and to found a family) of the European Convention on Human Rights are introduced. Compared to other international human rights conventions operating on the global level, the ECHR offers a fairly limited view of family life and marriage as civil rights issues, but in a form that is easier to apply than the generous formulations found in the Universal Bill of Human Rights (UDHR, ICCPR and ICESCR). Key concepts, techniques and doctrines of interpretation that the European Court of Human Rights has developed itself over the decades in its jurisprudence are discussed briefly. Definitions and typologies of family relations from the European Court and a comparable sociological account by Théry (1996) are discussed in order to find out what kind of relations are analysed in this study: biological, legal, social and gendered. This is followed by a description of how the data in this study has been selected and analysed.

The approach adopted in this study for analysing the data may be described as ‘relational analysis’ following the “relational approach” described by Nedelsky (2012, see also 2011: 74-77) which acts rather as a theoretical orientation and a way of posing questions on the links between ‘rights’ in the legal sphere and how they protect or affect social relations. Here, ‘relational’ refers to two different layers of interpretation and scrutiny. The first one is a more practical exercise of reading the judgements and decisions analysed in this study to detect what kind of relations between the applicants and their supposed family members are said to exist between them. Biological relations encompass genetic similitude and gestational relations but a wider sense of the word as well, referring to the social aspects and effects of conception, pregnancy and childbirth; legal relations entail recognition and support by the State to the family relations in question; social relations refer to domestic relations of everyday care, support and cohesion. This tripartite notion is complemented with gendered relations, an evident but unarticulated

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<sup>2</sup> *E.B. v. France* [GC], no. 43546/02, 22 January 2008.

<sup>3</sup> *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013.

<sup>4</sup> *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts).

<sup>5</sup> *Oliari and others v. Italy*, no. 18766/11 and 36030/11, 21 July 2015, ECHR-IV.

dimension in the gender-neutral language of ECHR case law. Finally, the subject matter at hand is evaluated with a second order of ‘relational analysis’ according to the relational approach articulated by Nedelsky (2012, 2011: 74-77) by examining how relations may be restructured with the help of interpreting rights in a novel way in order to protect the right to both give and receive care and to protect core values such as equality, autonomy and integrity.

With this theoretical and historical background and the practical and analytical approaches described above, the study then proceeds to reading relevant case law. Certain thematic sub-categories emerge from the wider categories of alliance, consanguinity and filiation. Chapter 4 focuses on alliance and the sub-categories of prohibited degrees of relationships in marriage, the (lack of a) right to dissolve one’s marriage, transgender marriage and same-sex unions and marriage. In the case law discussed in these sub-chapters, we see who is entitled to establish a State-recognised and protected category of sexual relationship with whom and how dissolving a marriage and remarrying have not really been seen as rights to be protected on an international level of human rights documents and treaties. So far, the European Court has given only modest support to a right of separation in marriage in *Airey v. Ireland*.

Marriage rights of transgender persons and same-sex couples, despite conforming to the model of ‘sexual marriage’ articulated by Fineman (1995) raise the question of whether a State should be interested in the content or physical appearance of such a relationship, as the emergence of same-sex marriage in different jurisdictions shows that requirements of consummation are rather outdated (Iacub 2009: 101-124). The main argument stemming from the analysis of relevant ECHR case law in this study is that alliance or recognised unions between two adults are relatively easily transformed into gender-neutral contracts. In Nedelskian terms (2011, 2012) the core value of equality is so easily protected with making alliance possible for both same-sex and opposite-sex couples of marriageable age and otherwise agreed upon categories to marry that it begins to emerge as a basic requirement in contemporary Western societies. In the context of the Council of Europe, this is supported by the ECHR judgement of *Oliari and others v. Italy*<sup>6</sup> where it is stated that States Parties should offer some form of civil unions to same-sex couples.

Chapter 5 on consanguinity or the genetic, gestational and biological components of parenthood displays how filiation comes into being in most cases, as coital reproduction in opposite-sex relationships remains the most common form of human reproduction. *Marckx v. Belgium*<sup>7</sup> and case law on

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<sup>6</sup> See *Oliari and others v. Italy*, no. 18766/11 and 36030/11, 21 July 2015, ECHR-IV. This judgement is outside the temporal scope of the data analysed in this study, so it is referred to rather as a landmark case and as a “sign of the times”.

<sup>7</sup> *Marckx v. Belgium*, no. 6833/74, 13 June 1979, Series A no. 31.

anonymous birth and unmarried fatherhood illustrate how women and men have, in different ways, been seen as inadequate parental subjects without the status conferred to both sexes by opposite-sex marriage, as it has provided the key structure to regulate reproduction and securing the legal status and obligation to care for children. Possibilities for rejecting and undoing maternity and paternity have always existed, but as they are structured so differently compared to one another, maternity and paternity as biologically based legal relations are highly incommensurable. Due to the physical limits to reproduction set by human corporeality, there is not much space for restructuring, in a Nedelskyan manner or not, the relations of female and male in human reproduction. The key to restructuring feminine and masculine parentage in order to make them more equal as compared to one another might lie in further disassociating alliance and filiation as recognised legal relations, not dependent from one another.

Chapter 6 builds on the making and unmaking of filiation on the basis on consanguinity, but highlights the other, more “human-made” forms of filiation that have also been appropriated by other categories of persons and couples than just opposite-sex couples. Adoption as a form of instituting filiation comes across as conceptually simple but difficult in practice due to its highly regulated nature. Judging who is suitable and fit to act as an adoptive parent is a process that lays a huge responsibility to State authorities and vests them with the task to direct considerable resources on evaluating who fits the category of suitable potential adoptive parents. Assisted reproduction, in turn, depending on how it is carried out, offers a wide spectrum of practices that range from fairly simple (insemination with legally available donated sperm) to expensive and physically demanding treatments such as *in vitro* fertilisation (IVF). Surrogacy acts as an extreme example of assisted reproduction, but its level of legality and enforceability, from legally prohibited, purely altruist, an “expenses only” basis to contractually enforceable and thus remunerated varies from State to State<sup>8</sup>.

The thematically selected case law data analysed in this study provides ample evidence for an argument that consanguineous (biogenetically based) maternity and paternity are substantively incommensurable when disputed in legal contexts and enduringly difficult to discuss in simplistic terms of gender equality calling for symmetry in rights in a relation of filiation to a child. This should not be taken as an argument against the viability of a pluralist view of acceptable forms of family life in society, but rather as a critique within a pluralist outlook on these issues. Due to contemporary conceptualisation of women as fully competent legal parental subjects, potential or actual, in Western industrialised societies, in itself a historically recent construction, and reasons of corporeality (processes of pregnancy and childbirth) the scales of justice tend to tip often towards the interests of the adult female subject in

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<sup>8</sup> See *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts) and *Labassee v. France*, no. 65941/11, 26 June 2014.

grand questions of personal entitlement to a child who has been born. Children, when born, are in a historically just as novel way conceptualised as a category of rights-bearers of their own (see Kelly 2005). The data analysed reveals a hierarchy of entitlement to establishing parental relations, where birth mothers, supposedly consanguineous fathers recognised at birth, full adoptive parents and co-parents through second-parent adoption inhabit different positions vis-à-vis a child. This hierarchy is open to debate, but it is helpful in evaluating the importance given to questions of knowledge of one's origins and the limits of the (in)alienability of human bodily capacities. Intersecting categories of legal sex, gender identity and choice of partner produce contexts where individuals may have various entitlements, claims and wishes. However, these intersecting categories often boil down to legal sex and physical reproductive capacities in which women and men inhabit asymmetrical positions, and this poses an enduring practical and ethical barrier in trying to reconceive the creation of relations of parent-child filiation in a gender-symmetrical manner.

Gamete donation and surrogacy emerge in the case law analysed as ethical and moral considerations of central importance in our time, as it is not enough that these practices are legally regulated within a State, but States need to decide how to respond to transnational service-seeking and how to recognise the existence of persons born of transnational surrogacy arrangements. Thus, many points in this study culminate in the judgements of *Mennesson v. France* and *Labassee v. France* from 2014, which are among the chronologically latest cases analysed in this study. Deciding what “is right” within a jurisdiction, either by legislators or courts, is not enough, as rules may need to be contingently accommodated to recognise the basic human rights, such as legal identity, legally relevant parental relations and nationality of children born from these arrangements. This problem of how to treat children born from discouraged forms of reproduction in the case of surrogacy resonates with the case of *Marckx v. Belgium* from 1979, as children were left without certain rights and entitlements due to the actions of their parents in times when the line of demarcation was the marital status of the parents. In the 1970s, the bone of contention was the legal status of children born out of wedlock, and in the 2010s, it was whether children born through a surrogacy arrangement abroad have a legal relationship to their parents in their home country or not. States in the West, East, North and South would need to regulate this through international treaties as well as paying due attention to the status of children born through surrogacy arrangements. In conclusion to this study, the emergence and the existence of ‘relational subjects’ in the fields of family law and international human rights law is examined. What might be the repercussions of “restructuring relations through rights” (Nedelsky 2011: 313) in the sphere of family life in order to protect the inalienable rights of children, women and men involved in processes of human reproduction?

## II RELATIONAL PERSPECTIVES

As the study above shows, the relationship between human rights thinking and the legal recognition of family relationships is both intriguing and problematic: intriguing mainly due to the richness of social and cultural variety in the empirical data that shows how people set themselves into relation with one another, forming couples, becoming parents and setting up households and family units. ‘Family’, as the theoretical and legal thinking exposed in Chapters 1 and 2 demonstrate, has been conceptualised and defined in many ways as a field which, in the theoretical imagination of philosophers, anthropologist and lawyers, too, is seen either as preceding larger society or as the kernel and smaller-scale image of larger communities, societies and States. However, by focusing on the positive import of both liberal individualist human rights thinking and perspectives of relational theories in different scholarly fields, it is possible to dissect this often monolithic and mystified concept into different kinds of relations, both between individuals and between individuals and institutions to see what normative goods may or should be protected in giving value and importance in the eyes of States to certain kinds of personal relations.

As fervent debates surrounding the possibility of same-sex marriage demonstrate (see McClain and Cere 2013), despite the complicated history of marriage as a highly variable institution both historically and geographically (see e.g. Cott 2000), there is lot to it that draws also modern-day couples, both opposite-sex and same-sex, to seek the status State-recognised alliance brings. In Europe, North America and a great many other Western(ised) States, the dominant interpretation of what family is, or might be, has very much departed from what was probably meant by the drafters of the Universal Declaration of Human Rights. This could be seen a few decades ago when the status of unmarried mothers and children born out of wedlock was amended after *Marckx v. Belgium* in 1979 and it can be seen today when debates on same-sex marriage, civil unions and shared parenthood for same-sex couples are on the agenda. In this study, it is argued that the judgement of *Marckx v. Belgium* and later maternity-related case law from the European Court of Human Rights<sup>9</sup> give support to the idea that the bi-generational unit of mother and child is the kind of a consanguineous ‘core family’ (Fineman 1995) around which other forms of parenthood are constructed. The forms of rejecting legal maternity after birth and the possibilities of disintegration of this unit in the case of anonymous birth and child abandonment highlight the fragile foundations of women as full parental subjects in the legal sense. Fatherhood, in non-conflictual cases, is a consanguineous relation that is subject to a relation of trust between the mother and father in order to take legal shape. It takes the form of a pre-existing or retroactive contract (marriage or

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<sup>9</sup> *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III, *Kearns v. France*, no. 35991/04, 10 January 2008, *Godelli v. Italy*, no. 33783/09, 25 September 2012.

legitimation by marriage) or the recognition of paternity or second-parent adoption (cohabitation or other forms of relations between parents) to come into being. However, mere consanguinity is never enough, as filiation instituted by recognition of paternity according to commonly agreed rules is what counts as a parent-child relation.

The shortcomings of the bundle of social and anthropological theory that Robcis (2013) calls the 'structuralist social contract' are evident when it comes to viewing kinship and family as historical formations. However, it is akin to the idea of kinship articulating the difference of the sexes and of generations as a theoretical abstraction (Théry 1999: 166) as it draws attention to what might be either cross-culturally shared or close to universal in the realm of kinship, family and reproduction. An often evoked example of this might be the incest taboo, or the fact that in general, family formation does not stray far from the 'symbolic order' of kinship and gender as it is a dominant, but not immutable model of intelligibility of the language applied to close personal relations. In turn, recent mobilisation in the area of changing family law has either been driven by universalist human rights argumentation, feminist and non-heterosexual subjectivities or a mixture of all of these. (See McClain and Cere 2013.) However, gender-neutrality, often 'achieved' with the means of deploying formal, gender-neutral language and principles in law and politics, often runs the risk of turning into a practice of gender-blindness (Lacey 1996; Pateman 1988: 187).

Legal relations act as the strongest form of family relations due to their State-sanctioned role, but are subject to proof of genetic, gestational and social relations. Biological relations are played out on different levels: genetic, gestational and corporeal, corporeal meaning everything that affects the physical integrity of the human body. Alone, genetic ties do not suffice to create a family relations. Social relations, in turn, are played out in the everyday interactions of persons who live together, be the relations between them recognised by law or not. They are the most tangible form of family relations: with whom and where one lives, eats, and sleeps and is taken care of, and are increasingly of prime importance if the parentage of a child needs to be established on the basis of everyday personal ties. All of these relations are gendered, and gender acts both as a hierarchy and a line of division against which the core value of equality is reflected. Through the data analysed in the three empirical chapters in this study (4, 5 and 6), it is shown that alliance (marriage and other forms of couplehood) may be politically, legally and bureaucratically changed more easily to a gender-neutral direction than filiation. Filiation, in turn, brings out the divergent corporeal investment and involvement of women and men as well as ensuing ethical considerations, of which the trickiest questions that emerge in the case law of the ECHR are the

right to know one's origins<sup>10</sup>, gamete donation<sup>11</sup> and surrogacy<sup>12</sup>. To most of these questions the answer is not a simple yes or no, but rather whose interests are at stake and how they should be taken into consideration. A variety of case law dealing with abandonment of newborn children, paternity recognition sought by (adult) children, adoption and different forms of assisted reproduction pose different, but intertwining questions on the extent to which the bodily substances and reproductive capacities on humans may be benefited from in the light of human rights principles.

### III GENDER, CORPOREALITY AND HUMAN RIGHTS

Women and men, be they of any sexual identity or tied by any form of alliance, are never on an equal footing when it comes to corporeality and reproduction. Limits set to the inalienability of the human person in both its conceptual and corporeal form are at the heart of what human rights are about, and this has implications to how adoption and assisted reproduction are evaluated and administered by legislators. From the perspective of a dynamic and temporally shifting interpretation of human rights principles as shared notions concerning what can be done with human persons and human bodies, there are no decisive answers to where the limits of acceptable and legally sanctioned behaviour may be drawn. So, for example, sperm donation is a widely condoned practice, whereas egg donation is less widely condoned<sup>13</sup> (see also Héritier 1985, 1996). Surrogacy is a more extreme example of a practice that has been either banned completely in many States or banned in its commercial form, and it has been viewed as a practice that affects the “inalienability of the human body and civil status”<sup>14</sup>.

In the light of the surrogacy cases discussed in Chapter 5 I suggest turning Iacub's (2004) idea of the “empire of the belly” on its head, as it may be argued that the maternal womb is a vital space through which all humans pass through. Iacub's argument is that the sanctity of Napoleonic marriage in the French context has been replaced with the privileged and sanctified importance given to fertile female bodies and maternal wombs. However, Iacub does not really engage with human rights thinking or the protection of women as a vulnerable category of persons on the global scale on the basis of their fertility, the inalienability of the human body or any other attempts to

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<sup>10</sup> For example, *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III, *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X.

<sup>11</sup> *S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011.

<sup>12</sup> *Mennesson v. France* and *Labassee v. France*.

<sup>13</sup> See comparative survey of legislation among Member States of the Council of Europe in *S.H. and Others v. Austria*, paras 35-40.

<sup>14</sup> *Mennesson v. France*, paras 55 and 58. *Mennesson* contains a brief note on the legal status of surrogacy arrangements in Europe, see para 78.

conceptualise human dignity either from a conceptual or a normative point of view. Obviously, the use of donated gametes, too, raises similar but less severe problems relating to the inalienability of the human body as it involves the alienation of one's genetic imprint to be passed on to other generations. Thus, gamete donation is opposed by certain persons, institutions and legislatures on the basis of ethical or even human rights based arguments. However, it has been clinically condoned and legislatively allowed and well established in many Member States of the Council of Europe and beyond. What is at stake here is to what extent the practice of gamete donation is related to the inalienability of the human body: if one may take something out of one's body with at least relatively little pain and medical risks, is it fair to the subject herself is she is willing to do so? Is she willing to do so because there is a reward other than being able to help other people have children, perhaps of a financial kind?

The main conceptual distinction that I wish to make on the basis on this study is that as pointed out several times in the analysis is that in light of relevant case law from the European Court of Human Rights, alliance (adult-adult relations) is more easily transformed to a gender-neutral relation than filiation (parent-child relations). This is not a normative argument against a pluralist view of family formation and family life. It is a critique of and perhaps a counterpoint to the sometimes simplistic notions that some pluralist advocates and organisations put forward when arguing for "more rights" to the persons they represent, be their frame of reference that of infertility, non-heterosexuality, transgender issues or some or all of the above. The disassociation of filiation and State-recognised forms of alliance has been developing for decades across European States and the industrialised West as a whole (Kiernan 2001, Bradley 2001) meaning that giving birth outside marriage does not carry the social stigma and uncomfortable legal consequences that it once did, of which *Marckx v. Belgium* acts as a historical reminder in the context of the Member States of the Council of Europe. Filiation is structured and flows somewhat differently than alliance, and the pain felt and political battles fought out to preserve marriage as it was generally known in the context of the 20th century as a union of a man and a woman for the sake of procreation and reproduction within that union stems from trying to preserve a world-view where alliance and filiation form a neat package conforming to the grid of genders and generations, the "symbolic order" of kinship and gender (see Robcis 2013).

It goes to note that emphasising the corporeality of reproduction and making normative arguments that point to the asymmetry and incommensurability of maternity and paternity as legal identities and bundles of rights might be interpreted as going against some of the core content of the political projects advocated by many activists committed to the lesbian, gay, bisexual and transgender (LGBT) cause of "family rights". However, the sincere attempt in this study has been to obtain an understanding of what 'family relations' consist of within the authoritative and supranational legal



culture of European human rights jurisprudence. Legal spousal and parental subjectivities are built on the foundation of the legal categories of sex that individuals are assigned to in society, which may be modified physically and legally in certain circumstances. How individuals are seen as subjects either as partners to other subjects or responsible for children depends on political and legal subjectivities opened up to them by collectivities such as the national legislature or political and legal thought in academia. The empirical data evident in the case law of the European Court of Human Rights and analysed in this study makes one confront various issues that need to be taken into consideration when instituting legal change, such as the importance of possibility to access information on one's genetic origins or making a distinction between the use of genetic material compared to the use of bodily processes and capacities that give birth to new rights-bearers.

I hope that that the approach adopted in this study has helped in seeing applicants to the European Court as "relational subjects" who argue their complaints to a supranational institution with the intention to make interpersonal relations that exist in their narratives worthy of State recognition. Respect for the "irreducible difference" that Lacey (1996: 150) refers to in the opening quote to this study is often difficult to apply to practice as it requires us to take another person's experiences seriously and to engage with how s/he sees it. I would not go as far as to argue that recent legislative changes in Europe concerning the definition of marriage or ways of instituting filiation would stem from purely subjective motivations where subjects wish to succumb the law to their desires or phantasies (a view put forward by e.g. Pierre Legendre, see Théry 2007: 583), but it must be borne in mind that despite good intentions not all parties to debates concerning what family is have thought seriously of balancing the interests and rights of all parties concerned. The issue of access to information on one's genetic origins, be it in the context of anonymous birth, adoption or assisted reproduction with donated gametes acts as a poignant reminder of this, as those who engage in the arduous legal processes related to this are of the second generation. Thus it is the task of collectivities and national legislatures to weigh how far the 'right to know' vital information on one's origins may be protected. It has been argued in this study that a historical shift from status, which rests on the distinctions made between the legal sexes and being married or not, to identity, which encompasses a wide variety of issues of legal identity, genealogy and nationality and knowledge on one's genetic origins to one's sexual and gender identity can be identified in the case law of the European Court of Human Rights. However, the question remains whether focus on individual identities is enough, or should "respect for each other's irreducible difference" (Lacey 1996: 150) focus more on relations between subjects as it is those life-sustaining relations of dependence, possession and care that make us what we are.

## AFTERTHOUGHT: ESTABLISHING FILIATION

*Maybe all we can know happens at the only “level” of social reality we have: the level of very specific fields of transaction where we make each other as lovers, friends, caring people, haters, enemies, or egocentric persons who can support or hurt each other. Maybe there is nothing else than us making our way through these various, complex, and quite unstable fields of transaction.*

*François Dépelteau (2013: 177)*

It is always difficult to give practical applications based on scholarly work, as taking various perspectives and counterpoints to them into account usually does not deliver clear bullet-pointed answers. However, on the basis of this study, it may be argued that principles found in ECHR case law point towards a certain model centered around the dyad of a child and pregnant woman in instituting filiation. What is recommended here is that in undisputed situations of expected childbirth, it should be possible for the pregnant woman and her partner, male or female, to establish a valid agreement of the presumption of parentage before the birth of the child. This already exists in some States, where an unmarried opposite-sex couple may declare the recognition of paternity before the birth, of course open to dispute if needed<sup>15</sup>. Likewise, in States where the female partner of a pregnant woman may be recognised as the child's other parent at birth, this has been taken care of. However, the crux of the matter is that this should not depend on the female couple being married on in a civil union, if the child is conceived with the help of assisted procreation at a private or public fertility clinic.

The presumption of parentage should be available when biological and social relations are expected to converge and to create legal relations. Thus, it should be possible for an expecting mother (pregnant woman) to enter into an agreement regarding parentage of the child to be born with her *partner* when there are no other adults competing for this privilege, which is the case in medically assisted procreation. Consent to the procedure would act as an agreement on the presumption of parentage in the same way as marriage, recognition of paternity or second-parent adoption do. However, in many States such a parental relation concerning an unmarried father or a female partner may be created only after birth. The rationale is that if possible, the child to be born would have two official parents at birth, not just the birth mother. This model aims to respect the origins of the child and the circumstances the child is born into, but in a way the respects the different forms of parentage that might be involved. The focus on what is agreed upon

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<sup>15</sup> For example, this has been instituted in the new Act on Paternity in Finland, taking effect 1 January 2016, where cohabiting opposite-sex couples may give a declaration of paternity before the birth at a public maternity clinic. This way, the child obtains two parents at birth just like a child born to a married opposite-sex couple.

is entering an agreement on taking responsibility of a child – regarding regulated or unregulated surrogacy, a birth mother would be the one solely in charge of giving or not giving the child away. Thus, agreements on parentage would not be a tool for opting out of maternity at birth or for claiming as one's own a child to who one does not have a recognisable link through a relationship of cohabitation, civil union or marriage to the birth mother.

In its classic form, marriage acts as an agreement and a pre-declaration of the joint parentage of the children born to the wife as the husband's own, and this would be the case for female couples as well if same-sex marriage with recognition of parentage within it is possible in the State in question. A shared address is the usual circumstance uniting the couple, and/or a shared life on the basis of other criteria. Up until the birth of a child, the partner of the expecting mother would be regarded as having entered into a relation of responsibility towards the child, which would then be realised and confirmed after birth when the details and identity of the child are entered into a population register. An agreement could be entered into provisionally after a certain number of weeks the pregnancy has lasted such as the limit of legal abortions. Once established, the agreement would act in much the same way as the presumption of paternity in marriage. However, there would be no need for intrusive questions on one's sexuality, sexual relations or understandings of fidelity in the procedures relating to declaration of paternity.

In most situations, an agreement would lead to the partner of the mother to be recognised as the other parent automatically, as in the case of women giving birth in opposite-sex marriage. If the filiation of a child would need to be disavowed, this procedure would progress in the same way as paternity is rejected and disputed within marriage, according to set criteria. DNA testing could be applied if the father had been under the impression that he is biologically related to the child. However, in cases of assisted reproduction with the help of donated gametes (sperm or eggs) filiation could not be rejected due to the absence of a genetic relation. What would matter would be the agreement of the parental parties regarding what kind of relations (marital, genetic, social) the filiation in question is based. An agreement on parentage could act as a device of greater transparency regarding a child's origins if information on how to access data on one's genetic origins would be included in the documents. In cases of missing genetic relations between parents and children, i.e. in adoption or the use of donated gametes, an agreement could be made in addition to a marriage contract. Expecting mothers could reject the affirmation of paternity according to the same rules as are in place in national legislation. Second-parent adoption after the birth of the child would be applicable only in situations where the parent-to-be would have appeared in the child's life after birth. Joint adoption would be, in itself, a form of an agreement on parentage, which would be established *post facto* on the basis of the joint intention of the parental parties to establish filiation.



# REFERENCES

## SOURCES

*N.B. Case law of the European Court of Human Rights listed under "Sources" is referred to as a substantive reference and not as research data.*

- A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010 (not in data).  
Accession Criteria (Copenhagen Criteria). Eur-Lex website, [http://eur-lex.europa.eu/summary/glossary/accession\\_criteria\\_copenhagen.html](http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html). Accessed 16 March 2016.
- American Anthropological Association (1947) Statement on Human Rights. *American Anthropologist* 49(1): 539-543.
- American Anthropological Association (1999) *Declaration on Anthropology and Human Rights*. <http://humanrights.americananthro.org/1999-statement-on-human-rights>. Accessed 16th March 2016.
- American Anthropological Association (2004) AAA Statement on Marriage and Family, 25th February 2004. <http://www.aaanet.org/issues/policy-advocacy/Statement-on-Marriage-and-the-family.cfm>. Accessed 12th March 2015.
- Adolphe, Jane (2006) The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family. *Ave Maria Law Review* 4(2): 343-384.
- Alby, Jean-Marc et al. (eds.) (1996) *Sur l'identité sexuelle : à propos du transsexualisme: ouvrage collectif*. Editions de l'Association freudienne internationale, Paris.
- Archer, Margaret S. (2012) *Reflexive Imperative in Late Modernity*. Cambridge: Cambridge University Press.
- Archer, Margaret (2013) Collective Reflexivity: A Relational Case for It. In: Powell, Christopher, and Dépelteau, François (eds.) *Conceptualising Relational Sociology: Ontological and Theoretical Issues*. Basingstoke: Palgrave Macmillan, 145-161.
- Ball, Carlos A. (2014) *Same-Sex Marriage and Children: A Tale of History, Social Science and Law*. Oxford: Oxford University Press.
- Barker, Nicola (2006) Sex and the Civil Partnership Act: The Future of (Non)Conjugality? *Feminist Legal Studies* 14(2): 241-259.
- Barker, Nicola (2012) *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage*. Basingstoke: Palgrave MacMillan.
- Bennett, Bruce S. (1998) *Banister v. Thompson and Afterwards: The Church of England and the Deceased Wife's Sister's Marriage Act*. *Journal of Ecclesiastical History* 49: 668-682.
- Bernat, Erwin (2002) A Human Right to Reproduce Non-Coitally - A Comment on the Austrian Constitutional Court's Judgement of 14 October 1999. *University of Tasmania Law Review* 21(1): 20-38.
- Bourdieu, Pierre (1991) Censorship and the Imposition of Form. In: Thompson, John B. (ed.) *Language and Symbolic Power*. London: Polity Press, 137-159.

- Bradley, David (2001) Regulation of unmarried cohabitation in West-European jurisdictions—determinants of legal policy. *International Journal of Law, Policy and the Family* 15: (22-50).
- Brown, Wendy (2002) At the Edge. *Political Theory* 30(4): 556–576.
- Brown, Wendy and Halley, Janet (2002) Introduction. In: Brown, Wendy and Halley, Janet (eds.) *Left Legalism/Left Critique*. London: Duke University Press.
- Browning, Don (2013) Legal Parenthood, Natural and Legal Rights, and the Best Interests of the Child: An Integrative View. In: McClain, Linda and Cere, Daniel (eds.) *What is Parenthood? Contemporary debates about the family*. New York: NYU Press, 105-123.
- Braidotti, Rosi (2012) Preface: The Society of Undutiful Daughters. In: Gunkel, Henriette, Nigianni, Chrysanthi and Söderbäck, Fanny (eds.) *Undutiful Daughters: New Directions in Feminist Thought and Practice*. New York: Palgrave Macmillan, ix-xx.
- Burleigh, Michael and Wippermann, Wolfgang (1991) *The Racial State: Germany 1933-1945*. Cambridge: Cambridge University Press.
- Burley, Jenny and Regan, Francis (2002) Divorce in Ireland: The fear, the floodgates and the reality. *International Journal of Law, Policy and the Family* 16: 202-222.
- Butler, Judith (1990) *Gender Trouble: Feminism and the Subversion of Identity*. London: Routledge.
- Butler, Judith (2000) *Antigone's Claim: Kinship Between Life and Death*. New York: Columbia University Press.
- Butler, Judith (2002) Is Kinship Always Already Heterosexual? *differences: A Journal of Feminist Cultural Studies* 13(1): 14-44.
- Cahill, Edward (1932) *The Framework of a Christian State*. Dublin: M.H. Gill and Son.
- Campbell, Tom (1999) Human Rights: A Culture of Controversy. *Journal of Law and Society* 26(1): 6-26.
- Carozza, Paolo G. (2003) Subsidiarity as a Structural Principle of International Human Rights Law. *American Journal of International Law* 97: 38-79.
- Casti Connubii* (1930) Encyclical of Pope Pius XI on Christian Marriage, 31st December 1930. [http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_31121930\\_casti-connubii.html](http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii.html). Accessed 15th April 2015.
- Cere, Daniel (2009) Human Rights and the Family. *Academic Questions* 22(1): 63-78.
- Cere, Daniel (2013) Toward an Integrative Account of Parenthood. In: McClain, Linda and Cere, Daniel (eds.) *What is Parenthood? Contemporary debates about the family*. New York: NYU Press, pp. 19-40.
- Chbihi Loudoudi and Others v. Belgium*, no. 52265/10, 16 December 2014 (not in data).
- Choudhry, Shazia and Herring, Jonathan (2010) *European Human Rights and Family Law*. Oxford: Hart Publishing.
- Commission des lois (2013) *Ouverture du mariage aux couples de personnes de même sexe – Audition de Mme Françoise Héritier, professeur honoraire au collège de France*. *Comptes rendus de la commission des lois*, 5th February 2013, <http://www.senat.fr/compte-rendu-commissions/20130204/lois.html>. Accessed 5th March 2015.

- Constitution of the Republic of Ireland*, Article 41.  
[http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf). Accessed 14 May 2009
- Colley, Jean-Paul (1979) *Éléments d'anthropologie sociale et culturelle*. Brussels: Editions de l'Université de Bruxelles.
- Collier, Richard (1995) *Masculinity, Law and the Family*. London: Routledge.
- Cott, Nancy F. (2000) *Public Vows: A History of Marriage and the Nation*. Cambridge, Mass.: Harvard University Press.
- Cretney, Stephen (2003) *Family Law in the Twentieth Century: A History*. Oxford: Oxford University Press.
- Crossley, Nick (2012) *Towards Relational Sociology*. New York: Routledge.
- Crossley, Nick (2013) Interactions, Juxtapositions and Tastes: Conceptualising "Relations" in Relational Sociology. In: Powell, Christopher, and Dépelteau, François (eds.) *Conceptualising Relational Sociology: Ontological and Theoretical Issues*. Basingstoke: Palgrave Macmillan, 123-144.
- Curle, Clinton Timothy (2007) *Humanité: John Humphrey's alternative account of human rights*. Toronto: University of Toronto Press.
- Davies, Margaret and Naffine, Ngaire (2001) *Are Persons Property? Legal Debates About Property and Personality*. Aldershot: Ashgate.
- Dembour, Marie-Bénédicte (2006) *Who Believes in Human Rights? Reflections on the European Convention*. Cambridge: Cambridge University Press.
- Dembour, Marie-Bénédicte (2010) What Are Human Rights? Four Schools of Thought. *Human Rights Quarterly* 32(1): 1-20.
- Dépelteau, François (2008) Relational Thinking: A Critique of Co-Deterministic Theories of Structure and Agency. *Sociological Theory* 26(1): 51-73.
- Dépelteau, François (2013) What is the Direction of the "Relational Turn"? In: Powell, Christopher, and Dépelteau, François (eds.) *Conceptualising Relational Sociology: Ontological and Theoretical Issues*. Basingstoke: Palgrave Macmillan, 163-186.
- Digest of Justinian (Imperatoris Iustiniani Opera)*  
<http://www.thelatinlibrary.com/justinian.html>. Accessed 12 November 2015.
- Draft Outline [of the Universal Declaration of Human Rights]*. Document E/CN.4/AC.1/3,  
[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/CN.4/AC.1/3](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/3). Accessed 16th March 2015.
- Documented Outline [of the Universal Declaration of Human Rights]*. Addendum 1 Document E/CN.4/AC.1/3/Add.1,  
[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/CN.4/AC.1/3/Add.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/3/Add.1). Accessed 16th March 2015.
- Donati, Pierpaolo (2011) *Relational Sociology: A new paradigm for the social sciences*. New York: Routledge.
- Donati, Pierpaolo and Archer, Margaret (2015) *The Relational Subject*. Cambridge: Cambridge University Press.
- Doran, Robert (2013) Editor's Preface: Rethinking Claude Lévi-Strauss (1908-2009). *Yale French Studies* 123, 1-5. [Special issue on Claude Lévi-Strauss]

- Duggan, Magdalena (2014) *Mater Semper Certa Est, Sed Pater Incertus?* Determining Filiation of Children Conceived via Assisted Reproductive Techniques: Comparative Characteristics and Visions for the Future. *Irish Journal of Legal Studies* 4(1): 1-23.
- Draft Marriage Act 1949 (Remedial) Order 2006*, Twenty-ninth Report of Session 2005–06, Report, House of Commons, 9 October 2006, available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/248/248.pdf>. Accessed 11th March 2015.
- Eekelaar, John (2006) *Family Law and Personal Life*. Oxford: Oxford University Press.
- Emirbayer, Mustafa (1997) Manifesto for a Relational Sociology. *American Journal of Sociology* 103(2): 281-317.
- Encyclopedia Britannica* (2014) Natural law. Online edition, updated 25th May 2014. <http://global.britannica.com/EBchecked/topic/406283/natural-law>. Accessed 15th April 2015.
- Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.
- Engle, Karen (2001) From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999. *Human Rights Quarterly* 23(3): 536-559.
- Ensellem, Cécile (2004) *Naître sans mère? Accouchement sous X et filiation*. Paris: Presses Universitaires de France.
- European Court of Human Rights (2009) *Chronological list of judgements and published decisions*, 3 December 2009. <http://www.strasbourgconsortium.org/docs/Chronological%20List%20of%20ECtHR%20cases.pdf>. Accessed 6 May 2015.
- European Court of Human Rights (2015a) *Factsheet – Sexual orientation issues*, April 2015. Available at [http://www.echr.coe.int/Documents/FS\\_Sexual\\_orientation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf). Accessed 9 April 2015.
- European Court of Human Rights (2015b) *Questions and Answers on the Paradiso and Campanelli v. Italy judgment* (27 January 2015) [http://www.echr.coe.int/Documents/Press\\_Q\\_A\\_Paradiso\\_and\\_Campanelli\\_ENG.pdf](http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf). Accessed 18 November 2015.
- Fassin, Eric (1998) Le savant, l'expert et le politique: la famille des sociologues. *Genèses* 32(1) : 156-169.
- Fassin, Eric (2000) Usage de sciences et la science des usages. *L'Homme* 154-155.
- Fassin, Eric (2001) Same Sex, Different Politics: “Gay Marriage” Debates in France and the United States. *Public Culture* 13(2): 215-232.
- Favret-Saada, Jeanne (2000) La-pensée-Lévi-Strauss. *Journal des anthropologues*, 53-70.
- Fortes, Meyer (1959) Descent, Filiation and Affinity: A Rejoinder to Dr. Leach: Part II. *Man* 59: 206-221.
- Fourest, Caroline (1998) L'ordre symbolique selon Irène Théry. *Prochoix* 7: 6-8. <http://www.prochoix.org/pdf/thery7.pdf>. Accessed 19 October 2015.
- Fрати, Paola, Busardo, Francesco Paolo, Vergallo, Gianluca Montanari, Pacchiarotti, Arianna and Fineschi, Vittorio (2015) Surrogate motherhood: Where Italy is now and where Europe is going. Can the genetic mother be considered the legal mother? *Journal of Forensic and Legal Medicine* 30: 4-8.



- Gairin, Victoria (2013) Mariage gay – Françoise Héritier : "Le mariage n'a rien de sacré". *Le Point* 23 April. [http://www.lepoint.fr/societe/mariage-gay-francoise-heritier-le-mariage-n-a-rien-de-sacre-23-04-2013-1658243\\_23.php](http://www.lepoint.fr/societe/mariage-gay-francoise-heritier-le-mariage-n-a-rien-de-sacre-23-04-2013-1658243_23.php). Accessed 12 March 2015.
- United Nations Human Rights Committee (1990) *General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23)*, United Nations Human Rights Committee, 27th July 1990, para 2. (Article 23) (Thirty-ninth session, 1990) [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11). Accessed 16th March 2015.
- Gevrek, Deniz (2014) Interracial Marriage, Migration and Loving. *The Review of Black Political Economy* 41(1): 25-60.
- Gilligan, Carol (1992) *In A Different Voice. Psychological Theory and Women's Development*. Cambridge, Mass.: Harvard University Press.
- Glendon, Mary Ann (1995) The Bitter Fruit of the Beijing Conference. *Wall Street Journal*, 21 September.
- Glendon, Mary Ann (2001) *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House.
- Glendon, Mary Ann (2003) The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea. *Harvard Human Rights Journal* 16: 27-39.
- Glendon, Mary Ann (2009) The Influence of Catholic Social Doctrine on Human Rights. In: Minnerath, Roland, Carulli, Ombretta Fumagalli and Possenti, Vittorio (eds.) *Catholic Social Doctrine and Human Rights. The Proceedings of the 15th Plenary Session of the Pontifical Academy of Social Sciences*, Pontifical Academy of Social Sciences, 67-82. <http://www.pass.va/content/dam/scienze-sociali/pdf/acta15/acta15-glendon.pdf>. Accessed 19 October 2015.
- Goldhaber, Michael D. (2007) *A People's History of the European Court of Human Rights*. New Brunswick: Rutgers University Press.
- Gomez, Marianne (1998) Aucune société n'admet de parenté homosexuelle. *La Croix*, 9 November.
- Gouttenoire, Adeline (2008) La relation parent-enfant dans la jurisprudence de la Cour européenne des droits de l'homme. *Informations sociales* 149 : 40-51.
- Green, André (1977) Atome de parenté et relations oedipiennes. In: Lévi-Strauss, Claude (ed.) *L'Identité: Séminaire interdisciplinaire dirigé par Claude Lévi-Strauss, professeur au Collège de France 1974-1975*. Paris: Bernard Grasset, 81-107.
- Green, André (2005) *Key Ideas for a Contemporary Psychoanalysis. Misrecognition and Recognition of the Unconscious*. Translated by Andrew Weller. London: Routledge.
- Green, R. (1978) Sexual identity of 37 children raised by homosexual or transsexual parents. *American Journal of Psychiatry* 135: 692-97.
- Grigolo, Michele (2001) Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject. *European Journal of International Law* 14(5): 1023-1044.
- Grosjean, Blandine (2012) Mariage gay : « La gauche devrait dire : "C'est génial ce qu'on fait !" » *Rue89 (Le Nouvel Observateur)*. 15 December. [Interview of Irène Théry] <http://www.rue89.com/2012/12/15/mariage-gay-la-gauche-devrait-dire-cest-genial-ce-quon-fait-237818>. Accessed 19th October 2015.

- Haberman, Clyde (1990) Rome Journal; Court Prevents Adoption and Fight Tugs at Child. *New York Times*, 1 March.  
[www.nytimes.com/1990/03/01/world/rome-journal-court-prevents-adoption-and-fight-tugs-at-child.html?pagewanted=all&src=pm](http://www.nytimes.com/1990/03/01/world/rome-journal-court-prevents-adoption-and-fight-tugs-at-child.html?pagewanted=all&src=pm).  
 Accessed 14 November 2015.
- Hart, Linda (2009) Individual Adoption by Non-Heterosexuals and the Order of Family Life in the European Court of Human Rights. *Journal of Law and Society* 36(4): 536-557.
- Hart, Linda (2012) Ihmisoikeudet ja perhe-elämän suoja ("Human rights and the protection of family life") . In Kantola, J, Saari, M & Nousiainen, K (eds.) *Tasa-arvo toisin nähtynä* ("Equality seen otherwise"). Helsinki: Gaudeamus, 284-300.
- Hastrup, Kirsten (2003) Representing the common good: The limits of legal language. In: Wilson, Richard Ashby and Mitchell, Jon P. (eds.) *Human rights in global perspective: Anthropological studies of rights, claims and entitlements*. London, Routledge, 16-32.
- Hastrup, Kirsten (2001) Accommodating Diversity in a Global Culture of Rights: An Introduction. In Hastrup, Kirsten (ed.) *Legal Cultures and Human Rights: The Challenge of Diversity*. Leiden: Brill.
- Heaphy, Brian (2015) Civil partnership and ordinary marriages. In Barker, Nicola and Monk, Daniel (eds.) *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections*. London: Routledge.
- Heinze, Eric (2001) Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity". *Michigan Journal of International Law* 22: 283-309.
- Held, Virginia (1998) Rights. In: Jaggar, A. M. and Young, I. M. (eds.) *A Companion to Feminist Philosophy*. Oxford : Blackwell.
- Héritier, Françoise (1985) L'individu, le biologique et le social. *Le Débat* 36: 27-32.
- Héritier, Françoise (1991) La famille. In: Bonte, P. and Izard, M. (eds.) *Dictionnaire de l'ethnologie et de l'anthropologie*. Paris : Presses Universitaires de France.
- Héritier, Françoise (1993) *Les deux soeurs et leur mère. Anthropologie de l'inceste*. Paris: Odile Jacob.
- Héritier, Françoise (1996) *Masculin/Féminin: La pensée de la difference*. Paris: Odile Jacob.
- Héritier, Françoise (2009) *Une pensée en mouvement*. Paris: Odile Jacob.
- Hodson, Loveday (2010) *NGOs and the struggle for human rights in Europe*. Oxford: Hart.
- Hodson, Loveday (2011) A Marriage by Any Other Name? *Human Rights Law Review* 11(1): 170-179.
- Hodson, Loveday (2012) Ties that Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families Under the ECHR. *The International Journal of Children's Rights*, 20(4): 501-522.
- Hodson, Loveday (2014) Activists and Lawyers in the ECtHR: The Struggle for Gay Rights. In: Anagnostou, Dia (ed.) *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*. Oxford: Hart Publishing.
- Howard-Hassmann, Rhoda E. (2001) Gay Rights and the Right to a Family: Conflicts Between Liberal and Illiberal Belief Systems. *Human Rights Quarterly* 23: 73-95.

- Hudoc User Manual* (2013) Library of the European Court of Human Rights, Strasbourg, 10 June 2013.  
[http://www.echr.coe.int/Documents/Library\\_Collection\\_Hudoc\\_Contentts\\_ENG.pdf](http://www.echr.coe.int/Documents/Library_Collection_Hudoc_Contentts_ENG.pdf). Accessed 6 May 2015.
- Iacub, Marcela (1998) Le couple homosexuel, le droit et le symbolique. *Le Banquet* 12, no pagination. Available at <http://www.revue-lebanquet.com/le-couple-homosexuel-le-droit-et-lordre-symbolique>. Accessed 14 November 2015. Reprinted in Iacub, Marcela (2009) *Le crime était presque sexuel et autres essais de casuistique juridique*. Paris: Flammarion, 347-370.
- Iacub, Marcela (2004) *L'Empire du ventre: Pour une autre histoire de la maternité*. Paris: Fayard.
- Iacub, Marcela (2009) *Le crime était presque sexuel et autres essais de casuistique juridique*. Paris: Flammarion.
- Jean-Klein, Iris and Riles, Annelise (2005) Introducing Discipline: Anthropology and Human Rights Administrations. *PoLAR: Political and Legal Anthropology Review* 28(2): 173-202.
- Johnson, Paul (2015) "'The choice of wording must be regarded as deliberate': same-sex marriage and Article 12 of the European Convention on Human Rights'. *European Law Review* 40(2): 207-224.
- Johnson, Paul (2015) Marriage, heteronormativity and the European Court of Human Rights: a reappraisal. *International Journal of Law, Policy and the Family* 29(1): 56-77.
- Johnson, Paul (2014) Sociology and the European Court of Human Rights. *The Sociological Review* 62(3): 547-564.
- Johnson, Paul (2013) *Homosexuality and the European Court of Human Rights*. New York: Routledge.
- Johnson, Paul (2012a) Adoption, homosexuality and the European Convention on Human Rights: Gas and Dubois v France. *Modern Law Review* 75(6): 1136-1149.
- Johnson, Paul (2012b) Heteronormativity and the European Court of Human Rights. *Law and Critique* 23(1): 43-66.
- Kelly, Fiona (2005) Conceptualizing the Child Through an 'Ethic of Care': Lessons for Family Law. *International Journal of Law in Context* 1(4): 375-396.
- Kennedy, Finola (1998) Two Priests, the Family and the Irish Constitution. *Studies: An Irish Quarterly Review* 87(348): 353-364.
- Kiernan, Kathleen (2001) The Rise of Cohabitation and Childbearing outside Marriage in Western Europe. *International Journal of Law, Policy and the Family* 15: 1-21.
- Kirchner, Stefan (2009) Foreign and International Influences on Family Law in the Netherlands: The Right to Family Life and Art. 8 of the European Convention on Human Rights. (January 8, 2008).  
<http://ssrn.com/abstract=1081583>. Full paper accessed 1st April 2009.
- Kittay, Eva Feder (1999) *Love's Labor. Essays on Women, Equality and Dependency*. New York: Routledge.
- Kuper, Adam (2002) Incest, Cousin Marriage, and the Origin of the Human Sciences in Nineteenth Century, England. *Past and Present* 174(1): 158-183.
- Lacey, Nicola (1995) Feminist Legal Theory Beyond Neutrality. *Current Legal Problems* 48(2): 1-38.

- Lacey, Nicola (1996) Normative Reconstruction in Socio-Legal Theory. *Social and Legal Studies* 5(2): 131-157. Reprinted in Lacey, Nicola (1998) *Unspeakable Subjects: Feminist essays in legal and social theory*. Oxford: Hart Publishing.
- Lagoutte, Stéphanie (2003) Surrounding and Extending Family Life: The notion of family life in the case-law of the European Court of Human Rights. *Nordisk Tidskrift for Menneskerettigheter* 21(3): 292-306.
- Lagoutte, Stéphanie and Árnason, Ágúst Thór (1999) 'Article 16'. In: Alfredsson, Gudmundur and Eide, Asbjørn (eds.) *The Universal Declaration of Human Rights: A common standard of achievement*. The Hague: Martinus Nijhoff, 325-357.
- Lasok, D. (1961) Legitimation, Recognition and Affiliation Proceedings. *International and Comparative Law Quarterly* 10(1): 123-142.
- Leckey, Robert (2008) *Contextual Subjects: Family, state and relational theory*. Toronto: University of Toronto Press.
- Legendre, Pierre (1985) *L'inestimable objet de transmission: étude sur le principe généalogique en Occident*. Paris: Fayard.
- Legendre, Pierre (1992) *Les enfants du texte: Étude sur la fonction parentale des États*. Paris: Fayard.
- Legendre, Pierre (1999) *Sur la question dogmatique en Occident*. Paris: Fayard.
- Lefaucheur, Nadine (2004) The French 'Tradition' of Anonymous Birth: The lines of argument. *International Journal of Law, Policy and the Family* 18(3): 319-342.
- Letsas, George (2007) *A Theory of Interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press.
- Letsas, George (2010) Strasbourg's Interpretive Ethic: Lessons for the International Lawyer. *European Journal of International Law* 21(3): 509-541.
- Lévi-Strauss, Claude (1949) *Structures élémentaires de la parenté*, Paris: Presses Universitaires de France.
- Lévi-Strauss, Claude (1956) La famille. Reprinted in Lévi-Strauss, Claude (1983) *Le regard éloigné*. Paris: Plon. Published in English as Lévi-Strauss, Claude (1971) *The Family*. In Shapiro, H. L. (ed.) *Man, Culture, and Society*. Oxford: Oxford University Press.
- Lévi-Strauss, Claude (1958) *Anthropologie structurale*. Paris: Plon.
- Lévi-Strauss, Claude (1967) *Structural Anthropology*. New York: Anchor Books. [Translation of Lévi-Strauss 1958]
- Lévi-Strauss, Claude (1973) Réflexions sur l'atome de parenté. *L'Homme* 13(3): 5-30.
- Lévi-Strauss, Claude (1974) *Race et histoire*. Paris: Éditions Gonthier.
- Lévi-Strauss, Claude (2000) Postface. *L'Homme* 154-155: 713-722.
- Liddy, Jane (1998) The concept of family life under the ECHR. *European Human Rights Law Review* 1/1998: 15-25.
- Loving v. Virginia*, U.S. Supreme Court, 388 U.S. 1 (1967), 12 June 1967 [judgement by the Supreme Court of the United States].
- Machado, Helena (2008) Biologising Paternity, Moralising Maternity: The Construction of Parenthood in the Determination of Paternity Through the Courts in Portugal. *Feminist Legal Studies* 16(2): 215-236.

- Maine, Henry Sumner (1861) *Ancient law: its connection with the early history of society, and its relation to modern ideas*. London: John Murray.
- Marckx, Paula (2010) *The Perfect Mistress, For Small Men with Large Ambitions*. Milton Keynes: AuthorHouse.
- Matlary, Janne Haaland (2009) What's in a Name? The Right to Life and the Right to Form a Family: Human Rights in the Political Process. In: Minnerath, Roland, Carulli, Ombretta Fumagalli and Possenti, Vittorio (eds.) *Catholic Social Doctrine and Human Rights. The Proceedings of the 15th Plenary Session of the Pontifical Academy of Social Sciences*, Pontifical Academy of Social Sciences, 225-246.  
<http://www.pass.va/content/dam/scienzesociali/pdf/acta15/acta15-matlary.pdf>. Accessed 19 October 2015.
- McClain, Linda (2013) A Diversity Approach to Parenthood in Family Life and Family Law. In: McClain, Linda and Cere, Daniel (eds.) *What is Parenthood? Contemporary debates about the family*. New York: NYU Press, 41-62.
- McClain, Linda and Cere, Daniel (eds.) (2013) *What is Parenthood? Contemporary debates about the family*. New York: NYU Press.
- McGhee, Derek (2001) *Homosexuality, Law and Resistance*. Oxford: Routledge.
- McGlynn, Clare (2006) *Families and the European Union: Law, politics and pluralism*. Cambridge: Cambridge University Press.
- McKenzie, Catriona and Stoljar, Natalie (2000) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*. New York: Oxford University Press.
- McLaughlin v. Florida, U.S. Supreme Court, 379 U.S. 184 (1964), 7 December 1964 [judgement by the Supreme Court of the United States].
- Mendehlson, Didier and Marchand, Isabelle (2004) *De mère inconnue: Pascale Odièvre, ou le combat des enfants nés sous X*. Paris: Albin Michel.
- Merry, Sally Engle (2006) *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press.
- Merry, Sally Engle (2010) What is Legal Culture? *Journal of Comparative Law* 5(2): 40-58.
- Meulders-Klein, Marie-Thérèse (1996) The Status of the Father in European Legislation. *American Journal of Comparative Law* 44: 487-520.
- Meyer, David D. (2006) Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood. *The American Journal of Comparative Law* 54: 125-144.
- Meyer, David D. (2013) Family Diversity and the Rights of Parenthood. In: McClain, Linda and Cere, Daniel (eds.) *What is Parenthood? Contemporary debates about the family*. New York: NYU Press, 124-143.
- Ministry of Justice of Quebec (2003) *Filiation*.  
<http://www.justice.gouv.qc.ca/english/publications/generale/filiation-a.htm>. Accessed 14th March 2015
- Minow, Martha and Shanley, Mary Lyndon (1996) Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law. *Hypatia* 11(1): 4-29.

- Morsink, Johannes (1999) *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. Philadelphia: University of Pennsylvania Press.
- MPs in Catholic Malta pass historic law on divorce, 25 July 2011, <http://www.bbc.com/news/world-europe-14285882>. Accessed 22nd June 2015.
- M.R. and D.R. v. An t-Ard-Chlazaritheoir*, IESC 60, 07 November 2014 [judgment by the Supreme Court of Ireland]. <http://www.bailii.org/ie/cases/IESC/2014/S60.html>. Accessed 12 November 2015.
- Nedelsky, Jennifer (2011) *Law's Relations: A Relational Theory of Self, Autonomy, and Law*. New York: Oxford University Press.
- Nedelsky, Jennifer (2012) Relations of Freedom and Law's Relations. *Politics and Gender* 8(2): 231-238.
- New Living Translation of the Bible*, 2007. <http://newlivingtranslation.com>. Accessed 26 October 2015.
- Report by a Group Appointed by the Archbishop of Canterbury (1984) *No Just Cause: The law of affinity in England and Wales: some suggestions for change*. London: CIO Publications.
- Novkov, Julie (2008) The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History? *Law and Social Inquiry* 33(2): 345-86.
- Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015 (not in data)
- Ortolang online lexicon, *Consanguinité*, <http://www.cnrtl.fr/lexicographie/consanguinit%C3%A9>. Accessed 14th March 2015.
- O'Flaherty, Michael and Fisher, John (2008) Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles. *Human Rights Law Review* 8(2): 207-248.
- Opinion of the Court (Full Court) of 18 December 2014. *Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties*. <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>. Accessed 17 November 2015.
- Ó Tuama, Seamus (2011) Revisiting the Irish Constitution and De Valera's Grand Vision. *Irish Journal of Legal Studies* 2(2): 54-87.
- Ovey, Clare and White, Robin (2006) *Jacobs and White: the European Convention on Human Rights*. Oxford: Oxford University Press.
- Oxford English Dictionary (2012) *Affinity*. Third Edition. [www.oed.com/view/Entry/5290?rskey=iPOz9e&result=1#eid](http://www.oed.com/view/Entry/5290?rskey=iPOz9e&result=1#eid). Accessed 14th April 2015
- Oxford English Dictionary (2012) *Alliance*. Third Edition. <http://www.oed.com/view/Entry/5290?rskey=iPOz9e&result=1#eid>. Accessed 14th April 2015
- Oxford English Dictionary (2012) *Consanguinity*. Third Edition. <http://www.oed.com/view/Entry/39456?redirectedFrom=consanguinity#eid>. Accessed 14th April 2015.

- Oxford English Dictionary (2012) *Filiation*. Third Edition.  
<http://www.oed.com/view/Entry/70177?redirectedFrom=filiation#eid>.  
 Accessed 14th April 2015.
- Oxford English Dictionary (2015) *De facto*.  
<http://www.oed.com/view/Entry/47599?rskey=vDC7gs&result=1#eid7497931>. Accessed 5th March 2016.
- Paradiso and Campanelli v. Italy*, no. 25358/12, 27 January 2015, European Court of Human Rights (not in data).
- Pateman, Carol (1988) *The Sexual Contract*. Cambridge: Polity Press.
- Perelman, Chaïm (1980) *Justice, Law, and Argument: Essays on moral and legal reasoning*. Dordrecht: Reidel.
- Pettiti, Louis-Edmond (1992) *Les Transsexuels*. [Que sais-je ? series] Presses Universitaires de France, Paris.
- Powell, Christopher, and Dépelteau, François (2013) Introduction. In: Powell, Christopher, and Dépelteau, François (eds.) *Conceptualising Relational Sociology: Ontological and Theoretical Issues*. Basingstoke: Palgrave Macmillan, 1-12.
- Pylkkänen, Anu (2012) *Vaihtoehto avioliitolle* (« Alternative to Marriage »). Helsinki: Gaudeamus – Helsinki University Press.
- Quadragesimo Anno* (1931) Encyclical of Pope Pius XI on Reconstruction of Social Order, 15th May 1931. [http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno.html](http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html). Accessed 15th April 2015.
- Radcliffe-Brown, A. R. (1941) The Study of Kinship Systems: Presidential Address. *Journal of the Royal Anthropological Institute* 71(1-2), 1-18.
- Rerum Novarum* (1891) Encyclical of Pope Leo XII on Capital and Labour, 15th May 1891.  
[http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html). Accessed 15th April 2015.
- Riles, Annelise (2000) *Network Inside Out*. Ann Arbor: University of Michigan Press.
- Robcis, Camille (2004) How the Symbolic Became French: Kinship and Republicanism in the PACS Debates. *Discourse* 26(3): 110-135.
- Robcis, Camille (2007) *The Politics of Kinship: Anthropology, Psychoanalysis, and Family Law in Twentieth-Century France*. Unpublished doctoral dissertation, University of Cornell.
- Robcis, Camille (2013) *The Law of Kinship: Anthropology, psychoanalysis, and the family in France*. Ithaca: Cornell University Press.
- Robcis, Camille (2015) Catholics, the 'Theory of Gender,' and the Turn to the Human in France: A 'New Dreyfus Affair?' *The Journal of Modern History* 87(4): 892-923.
- Rubin, Gayle (1975) The Traffic in Women: Notes on the "Political Economy" of Sex. In: Reiter, Rayna R. (ed.) *Toward an Anthropology of Women*. New York: Monthly Review Press.
- Scheffler, Harold (1985) Filiation and Affiliation. *Man* 20: 1-21.
- Scobie, William (1989) Italy up in arms over adoption fight. *The Telegraph*, 12 April.  
[http://news.google.com/newspapers?nid=2209&dat=19890412&id=9fwlAAAAIBAJ&sjid=G\\_wFAAAAIBAJ&pg=7047,3388132](http://news.google.com/newspapers?nid=2209&dat=19890412&id=9fwlAAAAIBAJ&sjid=G_wFAAAAIBAJ&pg=7047,3388132). Accessed 16 Sep 2013.
- Scott, Joan Wallach (1996) *Only Paradoxes to Offer: French Feminists and the Rights of Man*. Harvard: Harvard University Press.

- Schneider, David M. (1984) When the Natives Manipulate Their Own Culture: The Law of Marriage in England and Wales. *RAIN* 64: 4-6.
- Schneider, David M. (1987) *A Critique of the Study of Kinship*. Ann Arbor: University of Michigan Press.
- Schwenzer, Ingeborg (2007) Tensions Between Legal, Biological and Social Conceptions of Parentage. In: Schwenzer, Ingeborg (ed.) *Tensions Between Legal, Biological and Social Conceptions of Parentage*. Antwerp: Intersentia, 1-26.
- Serrarens, P.J.S. (1947) *Memorandum on Human Rights, Presented for the International Federation of Christian Trade-Unions by Mr. P.J.S. Serrarens, General Secretary of the I.F.C.T.U. Commission on Human Rights, United Nations, second session 3rd December 1947*, E/CN/.4/45, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/GL9/000/62/PDF/GL900062.pdf?OpenElement>. Accessed 15th April 2015.
- Sharkey, Stephen R. (ed.) (2012) *Sociology and Catholic Social Teaching: Contemporary Theory and Research*. Plymouth: Scarecrow Press.
- Simmonds, Claire (2013) An unbalanced scale: Anonymous birth and the European Court of Human rights. *Cambridge Law Journal* 72(2): 263-266.
- Spano, Robert (2014) Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity. *Human Rights Law Review* 14(3): 487-502.
- Spire, Antoine (2001) Entretien avec Pierre Legendre : "Nous assistons à une escalade de l'obscurantisme". *Le Monde*, 22 October.
- Stacey, Judith (2013) Uncoupling Marriage and Parenting. . In: McClain, Linda and Cere, Daniel (eds.) *What is Parenthood? Contemporary debates about the family*. New York: NYU Press, pp. 65-84.
- Stalford, Helen (2002) Concepts of Family under EU Law – Lessons from the ECHR. *International Journal of Law, Policy and the Family* 16(3): 410-434.
- Steiner, Eva (2003) Odièvre v France – Desperately seeking mother – anonymous births in the European Court of Human Rights. *Child and Family Law Quarterly* 15(4): 425-448.
- Supiot, Alain (2008) *Homo Juridicus: On the Anthropological Function of the Law*. London: Verso. Originally published in French by Seuil, 2005.
- Théry, Irène (1993) *Démariage: Justice et vie privée*. Paris: Odile Jacob.
- Théry, Irène (1996) Différence des sexes et différence des générations: L'institution familiale en déshérence. *Esprit* 227(12) : 65-90.
- Théry, Irène (1997) Le Contrat d'union sociale en question. *Esprit* 236(10) : 159-211.
- Théry, Irène (1998) *Couple, filiation et parenté aujourd'hui. Le droit face aux mutations de la famille et de la vie privée, Rapport à la ministre de l'Emploi et de la Solidarité et à la Garde des Sceaux, ministre de la Justice*. Paris: Odile Jacob – La Documentation française.
- Théry, Irène (1999) Pacs, sexualité et différence des sexes. *Esprit* 257(10) : 139-181.
- Théry, Irène (2007) *La distinction de sexe: Une nouvelle approche de l'égalité*. Paris: Odile Jacob.
- Théry, Irène (2013) *Mariage de même sexe et filiation*. Paris: Editions de l'École des hautes études en sciences sociales.
- Théry, Irène and Leroyer, Anne-Marie (2014) *Filiation, origines, parentalité : Le droit face aux nouvelles valeurs de responsabilité*



- générationnelle*. Paris: Odile Jacob. Also a web publication at [http://www.justice.gouv.fr/include\\_htm/etat\\_des\\_savoirs/eds\\_thery-rapport-filiation-origines-parentalite-2014.pdf](http://www.justice.gouv.fr/include_htm/etat_des_savoirs/eds_thery-rapport-filiation-origines-parentalite-2014.pdf). Accessed 10 November 2015.
- Toonen v. Australia, Communication 488/1992, UN Document CCPR/C/50/D/488/1992 (United Nations Human Rights Committee)
- Twenty-one detained persons against Germany*, 3134/67..., Decision, Commission (Plenary), 6th April 1968, European Court of Human Rights, [not in data].
- Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978, Series A no. 26.
- Vakulenko, Anastasia (2012) *Islamic Veiling in Legal Discourse*. New York: Routledge.
- Verschelden, Gerd (2007) Filiation, adoption, autorité parentale et le droit aux relations personnelles en Belgique anno 2007. In: Schwenzer, Ingeborg (ed.) *Tensions Between Legal, Biological and Social Conceptions of Parentage*. Antwerp: Intersentia, 53-89.
- Vet, Freek van der (2014) *Finding justice at the European Court of Human Rights: the dynamics of strategic litigation and human rights defense in the Russian Federation*. Helsinki: Department of Social Research, University of Helsinki.
- Walker, Kristen (2001) United Nations Human Rights Law and Same-Sex Relationships: Where to From Here? In: Wintemute, Robert and Andenaes, Mads (eds.) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*. Oxford: Hart Publishing, 743-757.
- Watson, A. (ed.) (1998) *The Digest of Justinian*. Philadelphia: University of Pennsylvania Press, 1998.
- Weeks, Jeffrey, Heaphy, Brian and Donovan, Catherine (eds.) (2001) *Same Sex Intimacies: Families of Choice and Other Life Experiments*. London: Routledge.
- Wintemute, Robert (2001) Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention. In: Wintemute, Robert and Andenaes, Mads (eds.) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*. Hart Publishing, London, pp. 713-729.
- Wintemute, Robert (2005) *Written Comments of FIDH, ILGA-EUROPE, BAAF & APGL, Submitted on 3 June 2005. Application No. 43546/02, E.B. v. France. European Court of Human Rights, Second Section*. [http://www.fidh.org/IMG/pdf/Written\\_Comments\\_E.B.\\_v.\\_France\\_FI\\_NAL.pdf](http://www.fidh.org/IMG/pdf/Written_Comments_E.B._v._France_FI_NAL.pdf). Accessed 2nd July 2015.
- Zaoui, Pierre (2005) L'ordre symbolique, au fondement de quelle autorité? *Esprit* 313(3-4): 223-241.

## TREATIES AND RELATED DOCUMENTS

- Beijing Platform for Action*, Chapter II, paragraph 29.  
<http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.  
 Accessed 17 November 2015.
- Constitution of the Republic of Ireland*,  
[http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf). Accessed 10 July 2015.

- Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, ECHR), opened for signature 4th November 1950. [https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention\\_ENG.pdf](https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf). Accessed 14th April 2015.
- Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted and opened for signature 18 December 1979, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>. Accessed 14th April 2015.
- Convention on the Rights of the Child* (CRC), adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. Accessed 14th April 2015.
- Charter of Fundamental Rights of the European Union*, solemnly proclaimed at the Nice European Council, 7th December 2000. Entry into force 1st December 2009 (as part of Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>. Accessed 14th April 2015.
- European Convention on the Adoption of Children (revised)*, adopted in the 118th Session of the Committee of Ministers (Strasbourg, 7 May 2008). <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680084823>. Accessed 17 November 2015.
- European Social Charter*, Treaty open for signature by the member States of the Council of Europe, opened for signature 18th October 1961, entry into force 26th February 1965. <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=1&CL=ENG>. Accessed 14th April 2015.
- European Social Charter (revised)*, Treaty open for signature by the member States of the Council of Europe, opened for signature 3rd May 1996, entry into force 1st July 1999, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG>. Accessed 14th April 2015.
- International Covenant on Civil and Political Rights* (ICCPR), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Accessed 14th April 2015.
- International Covenant on Economic, Social and Cultural Rights* (ICESCR), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>. Accessed 14th April 2015.
- Preparatory Work on Article 8 of the European Convention on Human Rights*, Secretariat of the European Commission on Human Rights, DH (56)12, Strasbourg, 9th August 1956, English translation, <http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH%2856%2912-EN1674980.pdf>. Accessed 1st April 2015.
- Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community*, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT>. Accessed 17 November 2015

*Universal Declaration of Human Rights*, Resolution 217 A (III) of 10 December 1948, General Assembly of the United Nations, <http://www.un.org/en/documents/udhr>. Accessed 14th April 2015.

*United Nations Treaty Collection*, Convention on the Elimination of All Forms of Discrimination against Women, Ratifications, Accessions and Successions. [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en). Accessed 10 July 2015.

## DATA: CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

### JUDGEMENTS: PRIMARY DATA

*Airey v. Ireland*, no. 6289/73, 9 October 1979, Series A no. 32

*Ageyev v. Russia*, no. 7075/10, 9 September 2013

*A.M.M. v. Romania*, no. 2151/10, 14 February 2012

*Aresti Charalambous v. Cyprus*, no. 43151/04, 19 July 2007

*B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005

*B. v. France*, 25 March 1992, Series A no. 232-C

*Backlund v. Finland*, no. 36498/05, 6 July 2010

*Berlin v. Luxembourg*, no. 44978/98, 15 July 2003

*Berrehab v. the Netherlands*, 21 June 1988, Series A no. 138

*Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008.

*Chavdarov v. Bulgaria*, no. 3465/03, 21 December 2010

*Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

*Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45

*E.B. v. France* [GC], no. 43546/02, 22 January 2008

*Emonet and Others v. Switzerland*, no. 39051/03, 13 December 2007.

*Evans v. the United Kingdom* [GC], no. 6339/05, § ..., ECHR 2007-I

*Fretté v. France*, no. 36515/97, ECHR 2002-I.

*Gas and Dubois v. France*, no. 25951/07, ECHR 2012

*Godelli v. Italy*, no. 33783/09, 25 September 2012.

*Grönmark v. Finland*, no. 17038/04, 6 July 2010.

*Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

*I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002

*İyilik v. Turkey*, no. 2899/05, 6 December 2011

*Johnston and others v. Ireland*, no. 9697/82, 18 December 1986, Series A no. 112

*Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X

*Keegan v. Ireland*, no. 16969/90, 26 May 1994, Series A no. 290

*Kearns v. France*, no. 35991/04, 10 January 2008

*Kozak v. Poland*, no. 13102/02, 2 March 2010.

*Kroon and Others v. the Netherlands*, no. 18535/91, 27 October 1994, Series A no. 297-C

- Kubiszyn v. Poland*, no. 37437/97, 30 January 2003  
*Kurochkin v. Ukraine*, no. 42276/08, 20 May 2010  
*Laakso v. Finland*, no. 7361/05, §15 January 2013  
*Labassee v. France*, no. 65941/11, 26 June 2014  
*Marckx v. Belgium*, no. 6833/74, 13 June 1979, Series A no. 31.  
*Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).  
*Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I  
*Mizzi v. Malta*, no. 26111/02, ECHR 2006-I (extracts)  
*Modinos v. Cyprus*, 22 April 1993, Series A no. 259  
*Norris v. Ireland*, 26 October 1988, Series A no. 142  
*Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III.  
*Ostase v. Romania*, no. 12547/06, 25 February 2014  
*Pascaud v. France*, no. 19535/08, 16 June 2011  
*Phinikaridou v. Cyprus*, no. 23890/02, 20 December 2007  
*Pini and Others v. Romania*, nos. 78028/01 and 78030/01, ECHR 2004-V (extracts)  
*Rasmussen v. Denmark*, no. 8777/79, 28 November 1984, Series A no. 87  
*Röman v. Finland*, no. 13072/05, 29 January 2013  
*Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010  
*S.H. and Others v. Austria* [GC], no. 57813/00, ECHR 2011  
*Shofman v. Russia*, no. 74826/01, 24 November 2005  
*Sutherland v. the United Kingdom* (striking out) [GC], no. 25186/94, 22 March 2001  
*Tavl v. Turkey*, no. 11449/02, 9 November 2006  
*Vallianatos and others v. Greece* [GC], no. 29381/09 and 32684/09, 7 November 2013  
*Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28 June 2007  
*X and Others v. Austria* [GC], no. 19010/07, ECHR 2013  
*X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgements and Decisions 1997-II

## DECISIONS AND REPORTS: SECONDARY DATA

- De Francesco v. Italy*, no. 13741/88, Commission decision of 12 March 1990  
*De Luca v. Italy*, no. 13823/88, Commission decision of 12 March 1990  
*Di Lazzaro v. Italy*, no. 31924/96, Commission decision of 10 July 1997  
*C. and L. M. v. the United Kingdom*, no. 14753/89, Commission decision of 9 October 1989  
*Eriksson and Goldschmidt v. Sweden*, application no. 14573/89, Commission decision of 9 November 1989  
*Giubergia; Giubergia-Gaveglia; Giubergia; Cruz v. Italy*, no. 15131/89, Commission decision of 5 March 1990  
*J.G. v. Ireland*, no. 9584/81, 8 May 1987, struck off the list  
*J.R.M. against the Netherlands*, No. 16944/90, Commission decision of 8 February 1993  
*Jolie v. Belgium*, no. 11418/85, Commission decision 14 May 1986.

*Jolie et Lebrun contre la Belgique*, no. 11418/85, Rapport de la Commission, 8 October 1987 (friendly settlement).

*Kerkhoven, Hinke and Hinke v. the Netherlands*, no. 15666/89, Commission decision of 19 May 1992

*Khan against the United Kingdom*, no. 11579/85, Commission decision of 7 July 1986

*K.M. against the United Kingdom* (dec.), no. 30309/96, 9 April 1997

*Lang-Lüssi v. Switzerland*, no. 22206/93, Commission decision of 06 September 1995

*L.F. v. Ireland* (dec.), no. 28154/95, 2 July 1997

*Marckx v. Belgium*, no. 6833/74, decision of 29 September 1975 on the admissibility of the application, p. 127-128.

*Marckx v. Belgium*, no. 6833/74, report of the Commission, adopted 10 December 1977, to be found in the Hudoc database as “Commission Européenne des Droits de l’Homme, Requête No. 6833/74, *Paula et Alexandra MARCKX contre Belgique*, Rapport de la Commission (adopté le 10 décembre 1977)”

*Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI

*M. v. Federal Republic of Germany*, no. 10995/84, Commission decision of 13 December 1984

*N.Q., M.S. and S.S. v. Italy*, 12612/86, Commission decision of 9 March 1990

*Pitzalis and Lo Surdo v. Italy*, no. 15296/89, Commission decision of 13 May 1992

*Röösli against Germany*, no. 28318/95, Commission decision of 15 May 1996

*S. v. United Kingdom*, no. 11716/85, Commission decision 26th August 1986

*Selim v. Cyprus* (dec.), no. 47293/99, ECHR 2001-IX. See also *Selim v. Cyprus* (friendly settlement), no. 47293/99, ECHR 2002-VI

*Spetz and others v. Sweden*, no. 20402/92, Commission decision of 12 October 1994

*Staiku v. Greece*, no. 35426/97, Commission decision of 2 July 1997

*Waser and Steiger v. Switzerland* (dec.), no. 31990/02, 23 October 2006

*W. v. the United Kingdom* (Report of the Commission), no. 11095/84, 7 March 1989

*X. and Y. against the United Kingdom*, no. 9369/81, Commission decision of 3 May 1983

*X. v. Switzerland* (dec.), no. 9057/80, 5 October 1981

*X v. the Federal Republic of Germany*, no. 6167/73, Commission decision of 18 December 1974, Decision and reports XX, p. 64

*X. v. the Federal Republic of Germany*, 6699/74, Commission decision 15th December 1977, D. R. 11, p. 16, IV A 3)

*X. v. the United Kingdom*, no. 7626/76, Commission decision of 11 July 1977

*X. v. Belgium and the Netherlands*, no. 6482/74, Commission decision of 10 July 1975

*X. v. France*, no. 9993/82, Commission decision of 5 October 1982

*X. v. the Netherlands*, no. 8896/80, Commission decision of 10 March 1981

*Zu Leiningen v. Germany* (dec.), no. 59624/00, ECHR 2005-XII.

## APPENDIX 1: DATA IN CHRONOLOGICAL ORDER

| Year | Case title(s), number(s)                                  | Date       | Type      |
|------|---|------------|-----------|
| 1974 | <i>X v. the Federal Republic of Germany</i> , 6167/73     | 18.12.1974 | Decision  |
| 1975 | <i>X. v. Belgium and the Netherlands</i> , 6482/74        | 10.07.1975 | Decision  |
| 1977 | <i>X. v. the United Kingdom</i> , 7626/76                 | 11.07.1977 | Decision  |
| 1977 | <i>X. v. the Federal Republic of Germany</i> , 6699/74    | 15.12.1977 | Decision  |
| 1978 | <i>Tyrer v. the United Kingdom</i> , 5856/72              | 25.04.1978 | Judgement |
| 1979 | <i>Marckx v. Belgium</i> , 6833/74                        | 13.06.1979 | Judgement |
| 1981 | <i>X. v. the Netherlands</i> , 8896/80                    | 10.03.1981 | Decision  |
| 1981 | <i>X. v. Switzerland</i> , 9057/80                        | 05.10.1981 | Decision  |
| 1979 | <i>Airey v. Ireland</i> , 6289/73                         | 09.10.1981 | Judgement |
| 1981 | <i>Dudgeon v. the United Kingdom</i> , 7525/76            | 22.10.1981 | Judgement |
| 1982 | <i>X. v. France</i> , 9993/82                             | 05.10.1982 | Decision  |
| 1983 | <i>X. and Y. against the United Kingdom</i> , 9369/81     | 03.05.1983 | Decision  |
| 1984 | <i>Rasmussen v. Denmark</i> , 8777/79                     | 28.11.1984 | Judgement |
| 1984 | <i>M. v. Federal Republic of Germany</i> , 10995/84       | 13.12.1984 | Decision  |
| 1986 | <i>Jolie v. Belgium</i> , 11418/85                        | 14.05.1986 | Decision  |
| 1986 | <i>Khan against the United Kingdom</i> , 11579/85         | 07.07.1986 | Decision  |
| 1986 | <i>S. v. United Kingdom</i> , 11716/85                    | 26.08.1986 | Decision  |
| 1986 | <i>Johnston and others v. Ireland</i> , 9697/82           | 18.12.1986 | Judgement |
| 1987 | <i>J.G. v. Ireland</i> , 9584/81                          | 08.05.1987 | Decision  |
| 1988 | <i>Berrehab v. the Netherlands</i> , 10730/84             | 21.06.1988 | Judgement |
| 1988 | <i>Norris v. Ireland</i> , 10581/83                       | 26.10.1988 | Judgement |
| 1989 | <i>W. v. the United Kingdo</i> , 11095/84                 | 07.03.1989 | Report    |
| 1989 | <i>C. and L. M. v. the United Kingdom</i> , 14753/89      | 09.10.1989 | Decision  |
| 1989 | <i>Eriksson and Goldschmidt v. Sweden</i> , 14573/89      | 09.11.1989 | Decision  |
| 1990 | <i>Giubergia... v. Italy</i> , 15131/89                   | 05.03.1990 | Decision  |
| 1990 | <i>N.Q., M.S. and S.S. v. Italy</i> , 12612/86            | 09.03.1990 | Decision  |
| 1990 | <i>De Francesco/De Luca v. Italy</i> , 13741/88, 13823/88 | 12.03.1990 | Decision  |
| 1992 | <i>B. v. France</i> , 13343/87                            | 25.03.1992 | Judgement |
| 1992 | <i>Pitzalis and Lo Surdo v. Italy</i> , 15296/89          | 13.05.1992 | Decision  |
| 1992 | <i>Kerkhoven... v. the Netherlands</i> , 15666/89         | 19.05.1992 | Decision  |
| 1993 | <i>J.R.M. against the Netherlands</i> , 16944/90          | 08.02.1993 | Decision  |
| 1993 | <i>Modinos v. Cyprus</i> , 15070/89                       | 22.04.1993 | Judgement |
| 1994 | <i>Keegan v. Ireland</i> , 16969/90                       | 26.05.1994 | Judgement |
| 1994 | <i>Spetz and others v. Sweden</i> , 20402/92              | 12.10.1994 | Decision  |
| 1994 | <i>Kroon and Others v. the Netherlands</i> , 18535/91     | 27.10.1994 | Judgement |
| 1995 | <i>Lang-Lüssi v. Switzerland</i> , 22206/93               | 06.09.1995 | Decision  |
| 1996 | <i>Röösli against Germany</i> , 28318/95                  | 15.05.1996 | Decision  |
| 1997 | <i>K.M. against the United Kingdom</i> , 30309/96         | 09.04.1997 | Decision  |
| 1997 | <i>X, Y and Z v. the United Kingdom</i> , 21830/93        | 22.04.1997 | Judgement |

|      |  |            |              |
|------|--|------------|--------------|
| 1997 | <i>L.F. v. Ireland</i> , 28154/95; <i>Staiku v. Greece</i> , 35426/97* | 02.07.1997 | Decision     |
| 1997 | <i>Di Lazzaro v. Italy</i> , 31924/96                                  | 10.07.1997 | Decision     |
| 2001 | <i>Sutherland v. UK</i> , 25186/94                                     | 22.03.2001 | Striking out |
| 2001 | <i>Mata Estevez v. Spain</i> , 56501/00                                | 10.05.2001 | Decision     |
| 2002 | <i>Mikulić v. Croatia</i> , 53176/99                                   | 07.02.2002 | Judgement    |
| 2002 | <i>Fretté v. France</i> , 36515/97                                     | 26.02.2002 | Judgement    |
| 2002 | <i>I. v. the United Kingdom</i> , 25680/94                             | 11.07.2002 | Judgement    |
| 2002 | <i>Selim v. Cypru</i> , 47293/99                                       | 16.07.2002 | Settlement   |
| 2003 | <i>Kubiszyn v. Poland</i> , 37437/97                                   | 30.01.2003 | Judgement    |
| 2003 | <i>Berlin v. Luxembourg</i> , 44978/98                                 | 15.07.2003 | Judgement    |
| 2004 | <i>Pini... v. Romania</i> , 78028/01, 78030/01                         | 22.06.2004 | Judgement    |
| 2005 | <i>B. and L. v. the United Kingdom</i> , 36536/02                      | 13.09.2005 | Judgement    |
| 2005 | <i>Zu Leiningen v. Germany</i> , 59624/00                              | 17.11.2005 | Struck off   |
| 2005 | <i>Shofman v. Russia</i> , 74826/01                                    | 24.11.2005 | Judgement    |
| 2006 | <i>Mizzi v. Malta</i> , 26111/02                                       | 12.01.2006 | Judgement    |
| 2006 | <i>Jäggi v. Switzerland</i> , 58757/00                                 | 13.07.2006 | Judgement    |
| 2006 | <i>Waser and Steiger v. Switzerland</i> , 31990/02                     | 23.10.2006 | Decision     |
| 2006 | <i>Tavli v. Turkey</i> , 11449/02                                      | 09.11.2006 | Judgement    |
| 2007 | <i>Evans v. the United Kingdom</i> , 6339/05                           | 10.04.2007 | Judgement    |
| 2007 | <i>Wagner and J.M.W.L. v. Luxembourg</i> , 76240/01                    | 28.06.2007 | Judgement    |
| 2007 | <i>Aresti Charalambous v. Cyprus</i> , 43151/04                        | 19.07.2007 | Judgement    |
| 2007 | <i>Emonet and Others v. Switzerland</i> , 39051/03                     | 13.12.2007 | Judgement    |
| 2007 | <i>Phinikaridou v. Cyprus</i> , 23890/02                               | 20.12.2007 | Judgement    |
| 2008 | <i>Kearns v. France</i> , 35991/04                                     | 10.01.2008 | Judgement    |
| 2008 | <i>E.B. v. France</i> , 43546/02                                       | 22.01.2008 | Judgement    |
| 2008 | <i>Burden v. the United Kingdom</i> , 13378/05                         | 29.04.2008 | Judgement    |
| 2010 | <i>Kozak v. Poland</i> , 13102/02                                      | 02.03.2010 | Judgement    |
| 2010 | <i>Kurochkin v. Ukraine</i> , 42276/08                                 | 20.05.2010 | Judgement    |
| 2010 | <i>Schalk and Kopf v. Austria</i> , 30141/04                           | 26.06.2010 | Judgement    |
| 2002 | <i>C. Goodwin v. the UK</i> , 28957/95                                 | 21.12.2010 | Judgement    |
| 2010 | <i>Backlund/Grönmark v. Finland</i> , 36498/05, 17038/04               | 06.07.2010 | Judgement    |
| 2010 | <i>Chavdarov v. Bulgaria</i> , 3465/03                                 | 21.12.2010 | Judgement    |
| 2011 | <i>Pascaud v. France</i> , 19535/08                                    | 16.06.2011 | Judgement    |
| 2011 | <i>S.H. and Others v. Austria</i> , 57813/00                           | 03.11.2011 | Judgement    |
| 2011 | <i>İyilik v. Turkey</i> , 2899/05                                      | 06.12.2011 | Judgement    |
| 2012 | <i>A.M.M. v. Romania</i> , 2151/10                                     | 14.02.2012 | Judgement    |
| 2012 | <i>Gas and Dubois v. France</i> , 25951/07                             | 15.03.2012 | Judgement    |
| 2013 | <i>Laakso v. Finland</i> , 7361/0                                      | 15.01.2013 | Judgement    |
| 2013 | <i>Röman v. Finland</i> , 13072/05                                     | 29.01.2013 | Judgement    |
| 2013 | <i>X and Others v. Austria</i> , 19010/07                              | 19.02.2013 | Judgement    |
| 2013 | <i>Ageyevy v. Russia</i> , 7075/10                                     | 09.09.2013 | Judgement    |
| 2013 | <i>Vallianatos... v. Greece</i> , 29381/09                             | 07.11.2013 | Judgement    |
| 2014 | <i>Ostace v. Romania</i> , 12547/06                                    | 25.02.2014 | Judgement    |
| 2014 | <i>Mennesson/Labassee v. France</i> , 65941/11; 65192/11               | 26.06.2014 | Judgement    |
| 2014 | <i>Hämäläinen v. Finland</i> , 37359/09                                | 16.07.2014 | Judgement    |

